

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

William P. Keesley, Circuit Court Judge

Case No. 2012-CP-32-0342

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SC Court of Appeals

Kay F. Paschal, ... Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Appellant/Respondent.

**APPELLANT'S BRIEF
OF APPELLANT-RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in its interpretation and application of Section 22-5-110, which resulted in the denial of directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial?
- II. Did the trial court err in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where the plaintiff did not show a lack of probable cause for the arrest warrants or the termination of the judicial proceedings in plaintiff's favor?
- III. Did the trial court err in denying Sheriff Lott's directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort?

STATEMENT OF THE CASE

This appeal involves a malicious prosecution and abuse of process action brought by the Respondent-Appellant Kay F. Paschal against the Appellant-Respondent Leon Lott in his official capacity as Sheriff of Richland County. In her complaint, Paschal asserted causes of action for false arrest, malicious prosecution, abuse of process, negligence and civil conspiracy. Prior to trial, the Defendants Heidi Scott,¹ Elizabeth Wallace and Jeffrey Wallace were dismissed. In addition, the civil conspiracy claim was dismissed.

The causes of action proceeded to trial on July 21, 2014, before Circuit Judge William P. Keesley and a jury. At the close of Paschal's case and again at the close of the evidence, Sheriff Lott moved for a directed verdict on multiple grounds. Judge Keesley granted a directed verdict on the false arrest claim, and Paschal withdrew the negligence claim. (R. 870). The malicious prosecution and abuse of process claims were submitted to the jury, which returned a verdict in favor of Kay Paschal on both claims. The jury also awarded actual damages of \$1.61 million. (R. 14).

After the verdict was returned, Sheriff Lott filed a motion for a judgment notwithstanding the verdict (JNOV). In the alternative, Sheriff Lott also moved for a

¹ Lt. Heidi Scott is now known as Heidi Jackson. She has been referred to by both names in the record including the trial transcript. For ease of discussion, she will be referred to as Heidi Scott throughout this brief.

new trial absolute and a new trial nisi remittitur. Judge Keesley denied each of those motions. (R. 1-11). He did, however, reduce the verdict to \$300,000 consistent with the monetary caps under the South Carolina Tort Claims Act. (R. 11).

Kay Paschal filed a Rule 59(e) motion which was denied by Judge Keesley by order filed April 30, 2015. (R. 12-13).

Sheriff Lott thereupon filed a timely appeal to this Court. Paschal also filed a cross-appeal.

STATEMENT OF FACTS

In early 2011, the Forest Acres Police Department contacted the Richland County Sheriff's Department ("RCSD"), requesting that the RCSD take over a case due to a possible conflict of interest. Since the subject location was 205 Spring Lake Road in Forest Acres and within the confines of Richland County, RCSD agreed to investigate the allegations. In particular, the investigation involved a recent report from family members of a suspected neglect and possible financial exploitation of an 88-year-old alleged crime victim, David Wallace, who had died on February 20, 2011.

At that time, Lt. Heidi Scott was employed by RCSD working with Victim's Assistance Services, and specifically as a Vulnerable Adult Investigator. Lt. Scott was directed by Captain Lancy Weeks to open an investigation. (R. 290).

Lt. Scott's Initial Meeting with the Wallace Children

On March 1, 2011 and nine days following David Wallace's death, Lt. Scott set up and conducted an in-person meeting with his two adult children, Elizabeth and Jeffrey Wallace, family friend Ellen Schorr, and Captain Weeks.² (R. 291). Elizabeth and Jeffrey Wallace were in their late 40s or early 50s and had resided out-

² Lt. Scott had not previously met or otherwise had any personal or professional dealings with Kay Paschal or the Wallace children. (R. 297-298).

of-state. (R. 307-308). They furnished Lt. Scott with factual background information as well as their concerns regarding their father. (R. 292).

Lt. Scott learned that on April 20, 2010, David Wallace suffered a major stroke following carotid artery surgery. Following the stroke, Wallace developed paralysis and difficulty speaking, conditions which confined him to a bed. Consequently, he was left in a mental and physical state in which he was fully dependent on others for his care and considered a vulnerable adult. After this April 20, 2010 debilitating stroke, David Wallace was hospitalized and incapacitated for an extended period of time. Following this hospital course, he was admitted to HealthSouth, an inpatient rehabilitation and treatment center in Columbia.

At that initial meeting, additional background was provided by Elizabeth and Jeffrey Wallace regarding Kay Paschal and her relationship with David Wallace. Paschal had been Wallace's attorney and a close friend. (R. 291-292).

During this meeting with Lt. Scott, Elizabeth and Jeffrey Wallace addressed several concerns with respect to their late father. For instance, following David Wallace's stroke, Kay Paschal, who resided with him, was limiting their contact with their father as well as contact from his friends. (R. 292).

In addition, they expressed concerns with David Wallace's Power of Attorney. The children understood that a Power of Attorney existed since 2002, and appointed Elizabeth Wallace as the attorney. The children had not been told anything different. (R. 292). Yet, on April 23, 2010, three days after Wallace's

stroke, Paschal had recorded a Power of Attorney for David Wallace which empowered her to act on his behalf. In particular, this new document identified Paschal as power of attorney and Elizabeth Wallace as "standby attorney," thus altering the 2002 Power of Attorney authorizing Elizabeth Wallace to act in such capacity. (R. 292).

The Wallace children also expressed concerns relating to Paschal's role in their father's physical care during the last months of his life, including such conditions as bed sores and malnutrition. (R. 292-294). At that time, Jeffrey Wallace filed the initial report with Forest Acres Police Department and notified DSS Adult Protective Services, thus triggering mandatory reporting protocols. (R. 293-294).

RCSD Investigation

The nature of the allegations were viewed as very serious and RCSD officials anticipated that the investigation would involve complex issues. (R. 303). Sgt. Kevin Isenhoward was asked to assist Lt. Scott with the investigation. (R. 303). At the early stage, investigatory duties were allocated between Sgt. Isenhoward (allegations as to medical neglect and pursuing a search warrant) and Lt. Scott (allegations as to financial exploitation). (R. 304).

Proceeding with her investigation as to allegations of financial exploitation, Lt. Scott arranged for the Power of Attorney instruments to undergo forensic examinations. On April 25, 2011, Forensic Document Examiner Marvin H.

Dawson, Jr. analyzed two Powers of Attorney and two separate front pages of Powers of Attorney in which Elizabeth Williams was named as power of attorney. (R. 311-318). Separately, Gail Heath, a SLED forensic scientist examined the Powers of Attorney and two separate front pages. (R. 325-326). The results of these respective examinations were consistent.

The examination results yielded that the first page of the recorded Powers of Attorney had been added at a later date, and therefore they were not the original first pages. (Significantly, the first page of each document is the only page that lists who is to serve as power of attorney). Additionally, the initials on the first pages of the recorded Powers of Attorney were examined and determined not to be those of David Wallace, while the other pages did contain Wallace's initials on them. Finally, there were numerous other indicators demonstrating that the pages naming Elizabeth Williams as power attorney were the original pages that had been attached to the document at one time.³ (R. 1027-1037).

Lt. Scott also learned that on June 18, 2010, Kay Paschal met with Tim Peterson of Carolina Mobility Sales located at 2546 Leaphart Road in Lexington County. On that date, Paschal presented the questionable Power of Attorney to authorize a trade of a 2002 Cadillac DeVille owned by David Wallace in order to obtain a trade-in allowance of \$5,000. This \$5,000 allowance was used towards

³ Further suspicions raised during the forensic evaluation process were the discrepancies in font and paper stock within the recorded documents. (R. 321-326).

the purchase of a 2010 Toyota Sienna van for a total price of \$63,317.51. Paschal presented a check of \$58,317.51 to Peterson from Wallace's Ameritrade account to pay for the remaining balance. Paschal's name was placed on the title of the vehicle, along with Wallace's name. (R. 208-213, 996-997).

Advice from Prosecutors

Since the circumstances involving the van purchase occurred in Lexington County, Lt. Scott conferred with her RCSD supervisors concerning the protocol to continue the pending Richland County-based investigation into Lexington County. On July 26, 2011, Lt. Scott met with Joanna McDuffie, Assistant Solicitor from the Fifth Judicial Circuit regarding the appropriate manner in which to proceed. (R. 328-329). During this meeting, McDuffie reviewed a voluminous amount of information relating to the RCSD investigation and Kay Paschal's conduct with respect to David Wallace, including but not limited to the Lexington County-based van purchase. As a result, McDuffie conveyed to Lt. Scott her professional opinion that probable cause existed for Paschal's arrest on several different criminal charges. (R. 808-809).

Aside from McDuffie's prosecutorial opinion that criminal charges were indeed warranted -- given that the van purchase had taken place in Lexington County -- McDuffie suggested that Lt. Scott consult with the Lexington Solicitor's Office

before pursuing warrants so as to seek further advice on how to proceed. (R. 808-810).⁴

On October 14, 2011, Lt. Scott furnished the Lexington-based information to Detective Steve Baumgardner with the Lexington County Sheriff's Department. (R. 330-332). Detective Baumgardner subsequently advised Lt. Scott that he was shortly beginning medical leave as he was going to have surgery. On November 4, 2011, Lt. Scott retrieved the file from Baumgardner. (R. 330-332).

At that point, Lt. Scott's supervisor, Major Stan Smith suggested that she contact Eleventh Circuit Deputy Solicitor Dayton Riddle to ascertain his preferences as to how she might proceed with the charges in Lexington County. On November 14, 2011, Lt. Scott held a teleconference with Deputy Solicitor Riddle. (Def. Ex. 8). During this conversation, Riddle assented to Lt. Scott pursuing a warrant in Lexington County, but he suggested that a Lexington County magistrate would ultimately need to make such a determination. (R. 1039-1058).

Arrest of Kay Paschal for Forgery and Breach of Trust

Acting upon Riddle's suggestion, on November 15, 2011, Lt. Scott met with Lexington County Magistrate Judge Scott D. Whittle. (R. 343-344, 348-350). Lt.

⁴ McDuffie testified that it was not uncommon that "cross over" criminal cases exist in which a subject commits crimes in both Richland and Lexington Counties resulting in potential dual or contemporaneous prosecutions in both the Fifth and Eleventh Judicial Circuits. (R. 809-810). McDuffie further explained that, by way of example, since the City of Columbia is situated in both Richland and Lexington Counties, the Solicitor's Offices must oftentimes address these "cross over" instances. (R. 809-810). Accordingly, McDuffie advised Lt. Scott that such a dialogue with a Lexington County prosecutor might avert such a predicament. (R. 812-813).

Scott identified herself to the magistrate as a RCSD investigator. (R. 348-349). Magistrate Whittle heard the facts of the investigation as set forth by Lt. Scott verbally. He then reduced these facts to a written affidavit which Lt. Scott signed.

After considering the testimony and evidence before him, Judge Whittle issued arrest warrants for forgery (No. J-830942) and breach of trust (No. J-830943) against Kay Paschal. (R. 1059-1060). Lt. Scott telephoned Paschal and advised that there were two arrest warrants at the Lexington County Sheriff's Department and provided information as to how she might appear at the detention center for service of said warrants. (R. 644-646). On November 16, 2011, Paschal appeared voluntarily at the Lexington County Detention Center, and these warrants were served upon her by a Lexington County deputy, and she was taken into custody. (R. 644-646). She was later released on a PR bond.

Preliminary Hearing

On January 20, 2012, a preliminary hearing was held in Lexington County at which time Paschal's attorney argued that the warrants should be dismissed for lack of probable cause and on jurisdictional grounds. Magistrate Gary Morgan ultimately dismissed the charges without stating the grounds for dismissal. There is no evidence in the record that states the basis for Magistrate Morgan's decision.

ARGUMENTS

I. The trial court erred in its interpretation and application of Section 22-5-110, which resulted in the denial of directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial.

There was one issue of law that particularly permeated the trial of this case and resulted in an incorrect and unjust verdict against Sheriff Leon Lott. That error in the interpretation and application of Section 22-5-110 negatively impacted both the denial of directed verdict and JNOV motions by Circuit Judge William Keesley but also prevented Sheriff Lott from receiving a fair trial.

Kay Paschal made Section 22-5-110 the center piece or focus of her case. She argued that that statute prohibited Lt. Heidi Scott from obtaining the two arrest warrants from Magistrate Scott Whittle in Lexington County. Further, she argued that Magistrate Whittle was required to issue courtesy summonses rather than arrest warrants. Paschal is incorrect on both counts.

Paschal relies on Section 22-5-110(B)(1) which states: "An arrest warrant may not be issued for the arrest of a person unless sought by a law enforcement officer acting in their official capacity." S.C. Code Ann. § 22-5-110(B)(1). In addition, she relies on Section 22-5-110(B)(2) which states: "If an arrest warrant is sought by someone other than a law enforcement officer, the court must issue a courtesy summons." S.C. Code Ann. § 22-5-110(B)(2).

Judge Keesley struggled with the proper interpretation and application of Section 22-5-110 throughout the trial. At the directed verdict stage, Judge Keesley stated his belief that Section 22-5-110 had not been complied with, when taking the evidence in a light most favorable to Paschal. (R. 767). He indicated that he could not rule that the arrest warrants were properly issued "at this stage." (R. 768). Later, when the issue was renewed on the directed verdict motion made at the close of the evidence, Judge Keesley simply denied the motion and erroneously concluded that "they're jury issues." (R. 862, 869). Thereafter, he charged the jury with the two subsections mentioned above but gave no explanation of their meaning or application, leaving that to the whim of the jury. (R. 937).

In ruling on post-trial motions, Judge Keesley candidly noted his "angst" in the interpretation and application of Section 22-5-110:

As to whether the court applied the law properly, that has been the cause of some angst in evaluating the post-trial motions. Some of this relates to the proper interpretation of S.C. Code Ann. § 22-5-110 and its applicability to the evaluation of the actions of the Defendant's deputy.

(R. 7). Judge Keesley noted that the parties' differing interpretations of Section 22-5-110 were "strenuously argued during trial." (R. 7). He further explained that Sheriff Lott "argues that § 22-5-110 is not jurisdictional and applies to magistrates issuing warrants, not to the law enforcement officers seeking them." (R. 7). Nonetheless, Judge Keesley concluded: "Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct

of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann. § 22-5-110." (R. 7).

The error committed by the trial court in how it handled the legal issues surrounding Section 22-5-110 -- including allowing the jury to determine that Lt. Scott violated those procedures -- is reversible error that warrants, at a minimum, a new trial absolute, that is, assuming that Sheriff Lott is not entitled to judgment as a matter of law for the reasons discussed below.

In order to understand the meaning and impact of Section 22-5-110, it is necessary to examine the law on courtesy summons, which is unique to South Carolina jurisprudence.⁵ The South Carolina Bench Book for Summary Court Judges describes a "courtesy summons" as follows:

A private citizen may swear out an affidavit concerning criminal charges against another without the assistance of law enforcement. When a private citizen serves as the affiant for a criminal offense at the summary court level, a courtesy summons should be issued, in lieu of an arrest warrant, pursuant to S.C. Code Section 22-5-115. (See Memorandum in Benchbook, dated July 7, 2008). The courtesy summons is criminal process and must be served on the defendant personally by law enforcement.

⁵ Counsel for Sheriff Lott was unable to find any other jurisdiction that uses a "courtesy summons" as an alternative charging document to an arrest warrant.

See, South Carolina Bench Book for Summary Court Judges. The memorandum referenced therein includes a list of items under the heading "Courtesy Summons Procedure." The first three items are as follows:

1. Courtesy summons (SCCA 519), authorized by Code § 22-5-115, is issued in lieu of arrest warrant when affiant is not a law enforcement officer investigating the case. If law enforcement officer serves as affiant, arrest warrant must be used.
2. Only offenses within the jurisdiction of magistrate and municipal court (currently \$500, 30 days, or both) may be written on a courtesy summons. General Sessions charges must be written on an arrest warrant.
3. Affiant must provide sworn statement establishing probable cause that the alleged crime was committed by the defendant. Summary court judge undergoes same analysis as if determining whether to issue an arrest warrant.

See, South Carolina Bench Book for Summary Court Judges, Memorandum Re: Courtesy Summons, dated July 7, 2008.

These very same points have been made by the South Carolina Attorney General in opinions issued on the use of a courtesy summons. For instance, in an opinion dated September 25, 2012, the Attorney General cited the relevant sections of Section 22-5-110 and wrote as follows:

A courtesy summons is issued by a summary court judge based upon the sworn statement of an affiant "who is not a law enforcement officer" or is issued to "nonlaw enforcement personnel." *See Ops. S.C. Atty. Gen.*, May 2, 2012; May 25, 2011; December 16, 2008. We have

previously stated that a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel. *See Op. S.C. Atty. Gen.*, August 7, 2008 ["... a courtesy summons must be used for summary level crimes involving victims charging a misdemeanor offense when the affiant is non-law enforcement personnel"]. In an opinion of this Office dated September 25, 2008, we concluded that a school resource officer is a law enforcement officer and would not be considered "nonlaw enforcement personnel" for purposes of §§ 22-5-110 or 22-5-115 regarding the issuance of a courtesy summons. *See Op. Atty. Gen.*, August 18, 2008 ["...a courtesy summons would be applicable in shoplifting and fraudulent check cases involving misdemeanor offenses where the warrant is signed by nonlaw enforcement personnel..."). Therefore, consistent with such, *a courtesy summons is to be utilized where an individual is charged with a misdemeanor offense and the affiant is nonlaw enforcement personnel.*

See, Op. Atty. Gen., September 25, 2012, 2012 WL 4711427. (Emphasis added).

To repeat, both the South Carolina Bench Book for Summary Court Judges and the South Carolina Attorney General have stated that a courtesy summons is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Importantly, neither of those elements is present here. The affiant was Lt. Heidi Scott who was the investigating officer. In addition, both warrants were for felonies. The first warrant was for a forgery of \$10,000 or more, which pursuant to Section 16-13-10(B)(1), is a felony. The second warrant was for breach of trust of over \$2,000 and under \$10,000, which pursuant to Section 16-13-260, is a felony. These were

not magistrate-level offenses, and as a result, Magistrate Whittle acted consistently with South Carolina law in issuing arrest warrants rather than courtesy summonses.

Judge Keesley obviously struggled with the language in Section 22-5-110(B)(1) which states: "An arrest warrant may not be issued for the arrest of a person unless sought by a law enforcement officer acting in their official capacity." S.C. Code Ann. § 22-5-110(B)(1). Paschal focused on the "in their official capacity" language to argue that Lt. Scott had no authority to seek an arrest warrant in Lexington County, and as a result, she was not acting "in her official capacity." Instead, Paschal insists Lt. Scott was acting as a private citizen, and therefore, a law enforcement officer was not the affiant and a courtesy summons should have been issued instead of the arrest warrants.

There are several major flaws in that reasoning. First, even if Lt. Scott sought the warrant as a non-law enforcement officer, a courtesy summons could not have been used by Magistrate Whittle because both offenses are felonies and non-magistrate-level offenses. Thus, the capacity of the affiant is immaterial to the discussion. A warrant, rather than a courtesy summons, had to be used. Second, if Lt. Scott was acting as a private citizen in seeking the arrest warrants and was not acting in her official capacity, then Sheriff Lott cannot be held liable under the Tort Claims Act.⁶ Therefore, Paschal's position is inconsistent with her claim that Sheriff

⁶ In *Flateau v. Harrison*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), this Court ruled that the Tort Claims Act "is intended to cover those actions committed by an employee

Lott is liable under the Tort Claims Act for the conduct of Lt. Scott in seeking her arrest. And third, South Carolina law recognizes that a law enforcement officer may be the affiant on a warrant to be executed in another jurisdiction. In *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978), the South Carolina Supreme Court addressed the validity of a search warrant that was sought by a municipal law enforcement officer for the search of premises that were located outside of his jurisdiction. The Supreme Court ruled "that the fact the place to be searched was outside of Officer Parsons' jurisdiction did not, in and of itself, render the search warrant invalid." 242 S.E.2d at 413. This principle of law from *Hammond* was later applied by the federal district court in the case of *United States v. Hardy*, 2006 WL 208865 (D.S.C. 2006), wherein Judge Henry Herlong upheld the validity of a search warrant alleged to have been obtained by officers from the Cherokee County Sheriff's Office for execution on premises located in Spartanburg County. Judge Herlong wrote:

[U]nder South Carolina law "the fact that the place to be searched" is outside of the warrant applicant's jurisdiction does not "in and of itself, render the search warrant

within the scope of the employee's official duty." 584 S.E.2d at 416. As this Court further explained, "[t]he provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." *Id.*, citing S.C. Code Ann. § 15-78-20(f). Similarly, in *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998), this Court held as follows: "Code section 15-78-20(f) limits coverage to employees 'acting within the scope of official duty.' ... For a government employee to be acting within the scope of his official duty or employment, the employee must be (1) 'acting in and about the official business of the government entity,' and (2) 'performing official duties.'" 498 S.E. at 688.

invalid." *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411, 413 (S.C. 1978). As such, even if an officer from Cherokee County signed the search warrant, the warrant is not invalid.

2006 WL 208865, *2. Although *Hammond* and *Hardy* both involve search warrants, there is no reason that an arrest warrant should be treated any differently. In other words, if a law enforcement officer may be the affiant on a search warrant to be executed in another jurisdiction, the same should be true for an arrest warrant as well.

In short, Lt. Scott was acting in her official capacity as a law enforcement officer when she signed the arrest warrants as the affiant. Importantly, the arrest warrants were not served by Lt. Scott or any Richland County deputy. Instead, they were served by a Lexington County deputy after Paschal turned herself in at the Lexington County Detention Center. The arrest itself therefore was effected by a law enforcement officer from Lexington County, which renders the arrest valid and consistent with applicable South Carolina law.

To summarize, reversible error was committed by Judge Keesley in his handling of the legal issues pertaining to Section 22-5-110. As Sheriff Lott argued, Section 22-5-110 is not a jurisdictional statute, and it was not up to Lt. Scott to determine whether an arrest warrant or a courtesy summons should have been issued. The arrest warrants were not invalid per the procedure that was followed by Lt. Scott. Moreover, the proper application of Section 22-5-110, as discussed herein, demonstrates that Judge Whittle did not err in issuing the arrest warrants. The

warrants were sought by a law enforcement officer investigating the case and were for two felony offenses. Accordingly, a courtesy summons could not have been utilized in lieu of an arrest warrant. Both Lt. Scott and Magistrate Whittle complied with proper procedure under Section 22-5-110. Judge Keesley erred in failing to so rule and erred even more so in allowing the jury to make that legal determination. At the very least, a new trial absolute is warranted on this basis.

II. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where the plaintiff did not show a lack of probable cause for the arrest warrants or the termination of the judicial proceedings in plaintiff's favor.

Kay Paschal alleged a cause of action for malicious prosecution arising from her arrest on the forgery and breach of trust charges. Sheriff Lott moved for a directed verdict and later a JNOV on that cause of action. Sheriff Lott contends that Paschal failed to present evidence of the six elements required for proving a malicious prosecution claim.

The elements of malicious prosecution under South Carolina law are: "(1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870-71 (Ct. App. 2012). Sheriff Lott contends that

Paschal failed to present proof of (1) a lack of probable cause, and (2) the termination of the charges in her favor.

A. Lack of Probable Cause

In *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005), this Court explained that "[p]robable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." 623 S.E.2d at 658, *citing State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996). "Probable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- known to the arresting officer." *Jackson*, 623 S.E.2d at 659. Importantly, "[t]he determination of probable cause is not an academic exercise in hindsight." *Id.* "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers' disposal." *State v. George*, 323 S.C. 496, 476 S.E.2d 903, 911 (1996). "A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity." *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468, 472 (Ct. App. 2011).

"The term 'probable cause' does not import absolute certainty." *Lapp v. South Carolina Department of Motor Vehicles*, 387 S.C. 500, 692 S.E.2d 565, 568

(Ct. App. 2010). In fact, "[a] finding of probable cause may be based upon less evidence than would be necessary to support a conviction." *Id.* Thus, it is well settled that probable cause does not turn on an individual's actual guilt or innocence." *State v. Manning*, 400 S.C. 257, 734 S.E.2d 314, 319 (Ct. App. 2012).

Sheriff Lott submits that Lt. Scott had probable cause for both the forgery and the breach of trust charges. However, it is important to point out that probable cause need not exist for both charges in order for Sheriff Lott to prevail on his directed verdict and JNOV motions. In fact, in *Devenpeck v. Alford*, 543 U.S. 146 (2004), the United States Supreme Court rejected the view that probable cause to arrest must be predicated upon the offense actually invoked by the arresting officer. The Court explained that "the subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." 543 U.S. at 153. Therefore, the courts are required to "focus on the validity of the *arrest*, and not on the validity of each charge." *Jaegly v. Couch*, 439 F.3d 149, 153 (2d Cir. 2006). (Emphasis in original). "Following *Devenpeck*, ... a claim for false arrest turns only on whether probable cause existed to arrest a defendant, and ... it is not relevant whether probable cause existed with respect to each individual charge, or, indeed, any charge actually invoked by the arresting officer at the time of arrest." *Id.*

The offense of forgery "consists of the fraudulent making or altering of a writing by one intending to defraud, prejudice, or damage another person." *State v. Lee-Grigg*, 374 S.C. 388, 649 S.E.2d 41, 47 (Ct. App. 2007) "It has been defined

as a false making of an instrument, on its face purporting to be good and valid, with a design to defraud, prejudice, or damage another." *Id.* "The crime of forgery involves: (1) a false making or material alteration of some written instrument; (2) that is the apparent foundation of some legal liability; and (3) that is uttered or published with the intent to defraud or prejudice another." 649 S.E.2d at 48.

The record contains sufficient evidence that would lead an objectively reasonable law enforcement officer to believe that probable cause existed for the forgery offense. As Lt. Scott explained during her testimony, she obtained in her investigation a Power of Attorney for David Wallace, which was allegedly executed on May 20, 2002, but then not recorded until almost eight years later on April 23, 2010, which was three days after Wallace suffered a debilitating stroke. That version of the Power of Attorney appointed Kay Paschal as the attorney and Elizabeth G. Wallace as the "standby attorney." Lt. Scott's investigation also turned up the first two pages of another version of the Power of Attorney for David Wallace. That version is nearly identical except that it appoints Elizabeth G. Wallace as the attorney and Kay Paschal as the "standby attorney." Both versions include the date of "05/17/02" at the bottom right-hand corner of each page next to the initials "DW." The "DW" initials, however, appear different on the first two pages of the two versions. (R. 311-320, 952-965).

The two versions of the Power of Attorney were examined by two forensic documents examiners. The record includes reports from Marvin H. Dawson, Jr., a

private examiner, and from Gaile Heath, who was employed by the South Carolina Law Enforcement Division (SLED). The Dawson report makes several key findings as follows:⁷

- (1) Dawson found a different paper stock was used for page 1 of each version.
- (2) Page 1 of the recorded Power of Attorney showing Kay Paschal as attorney was a different paper stock than pages 2-6.
- (3) Page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney was the same paper stock as pages 2-6.
- (4) There were font defects on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney and pages 2-6, but no font defects on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney.
- (5) The "DW" initials on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were not made by David Wallace.
- (6) The staple holes on page 1 of the recorded Power of Attorney showing Kay Paschal as attorney were fewer than the staple holes on pages 2-6. The staple holes on page 1 of the unrecorded Power of Attorney showing Elizabeth Wallace as attorney matched the staple holes on pages 2-6.

(R. 1027-1031). The SLED report made similar findings, except the SLED examiner stated only that "there was a strong probability that David Wallace did not write the "DW" initials appearing on [page 1 of the recorded Power of Attorney showing Kay Paschal as attorney]," as opposed to making the definitive finding

⁷ It is important to note that the Power of Attorney was prepared front and back. Therefore, the twelve sides of the document made up a six-page document.

like Dawson that Wallace did not write the initials. (R. 1035). Therefore, based on those reports, Lt. Scott had substantial evidence that pages 1-2 of the recorded Power of Attorney had been altered, and there was circumstantial evidence that Kay Paschal had committed that offense because she had prepared the documents and the one change was to grant her the power of attorney in place of Elizabeth Wallace. In addition, the Power of Attorney was not recorded until almost eight years after it was executed but three days after David Wallace had suffered a debilitating stroke.

That Power of Attorney was then used on June 18, 2010, to purchase a Toyota Sienna handicapped van from Carolina Mobility Sales located in West Columbia, South Carolina. A 2002 Cadillac Deville owned by David Wallace was traded in as part of that transaction. After accounting for the \$5,000 allowance from the trade-in, the purchase price was \$58,317.51. Paschal made payment in that amount using a check from David Wallace's account and signed his name to the check. The van was titled in both the names of David Wallace and Kay Paschal, whereby she was able to obtain a right of title to that vehicle. Prior to swearing the arrest warrants, Lt. Scott had also spoken with Tim Peterson, the employee with Carolina Mobility Sales that handled the sale of the van. She initially spoke with him by phone and later memorialized that conversation with a written statement. (R. 212-213, 996-997). Peterson informed Lt. Scott that David Wallace was not with Kay Paschal when the van was purchased, and in fact, no

one else was present during the transaction. Peterson also advised that Paschal signed Wallace's name to the paperwork and presented a Power of Attorney to him. (R. 463-465, 996). Based upon these facts as gathered as part of her investigation, Lt. Scott had probable cause to support the forgery charge.

Probable cause also exists for the breach of trust charge.⁸ S.C. Code Ann. § 16-13-260 provides that "[a] person who falsely and deceitfully obtains or gets into his hands or possession any money, goods, chattels, jewels, or other things of another person by color and means of any false token or counterfeit letter made in another person's name is guilty of a felony ... if the value of the property is more than two thousand dollars but less than ten thousand dollars." S.C. Code Ann. § 16-13-260(2). The same facts as discussed above provided probable cause for this charge as well. The evidence known to Lt. Scott was that Kay Paschal used a false or fraudulent Power of Attorney to obtain a share of the title to the Toyota Sienna van which was inclusive of the \$5,000 received as a trade-in for David Wallace's Cadillac.

In sum, both the forgery and the breach of trust charges were based upon the transaction that resulted from Kay Paschal using the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively

⁸ The arrest warrant reflects that the breach of trust charge was based on S.C. Code Ann. § 16-13-260. (R. 1060). However, it does not appear that Judge Keesley charged the jury the elements of that offense. (R. 934-935).

reasonable law enforcement officer knowing that information would believe that probable cause existed for these crimes under South Carolina law. This Court has previously explained that "[a]lthough the question of whether probable cause exists is ordinarily a jury question, it may be decided as a matter of law when the evidence yields but one conclusion." *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 660 (Ct. App. 2005). Here, as it did in *Jackson*, the evidence yields one conclusion – that probable cause exists as a matter of law for the forgery and breach of trust offenses.

This conclusion is further supported by the fact that Lt. Scott consulted with solicitors in both Richland County and Lexington County. Joanna McDuffie, a Fifth Circuit Assistant Solicitor, testified that she had reviewed the investigation conducted by Lt. Scott and that she had offered Lt. Scott her legal opinion that "there was probable cause to proceed in pursuing that charge and told her that, in my opinion, there were multiple charges that could be made, different charges. And I probably listed off four or six that I believed that she had probable cause to pursue." (R. 808-809). At McDuffie's suggestion, Lt. Scott also consulted with Dayton Riddle, an Eleventh Circuit Deputy Solicitor. Riddle did not testify at trial, but a transcript of his telephone conversation with Lt. Scott was admitted into evidence. In that telephone conversation, Riddle discussed the evidence with Lt. Scott and offered suggestions as to the charges that she could pursue. (R. 1039-1058).

Similarly, in *McKinney v. Richland County Sheriff's Dept.*, 431 F.3d 415 (4th Cir. 2005), the Fourth Circuit recognized that "[b]oth a prosecutor and a neutral and detached magistrate independently reviewed the evidence and concluded that there was probable cause." 431 F.3d at 419. The Fourth Circuit then explained that "[a] reasonable officer would not second-guess these determinations unless probable cause was plainly lacking, which it was not." *Id.* See also, *Melton v. Williams*, 281 S.C. 182, 314 S.E.2d 612, 615 (Ct. App. 1984) ("Good faith reliance upon advice of fully informed counsel may establish probable cause"). The same is true in this case. Accordingly, Judge Keesley erred in denying Sheriff Lott's directed verdict and JNOV motions and in concluding that the lack of probable cause element of the malicious prosecution claim was a jury question.

B. Favorable Termination of Charges

An additional element that Kay Paschal has the burden of proving is the termination of the judicial proceedings in plaintiff's favor. In *McKenney v. Jack Eckerd Company*, 304 S.C. 21, 402 S.E.2d 887 (1991), the South Carolina Supreme Court adopted the majority rule that an action for malicious prosecution may be maintained only when the accused establishes "that the charges were dismissed for reasons which imply or are consistent with innocence." 402 S.E.2d at 888. Here, Paschal has not made that showing.

Paschal has only shown, at most, that the two arrest warrants were dismissed by Magistrate Gary Morgan following a preliminary hearing held on January 20, 2012. No order was entered into evidence as to the ruling made by Magistrate Morgan. No portion of the transcript from the preliminary hearing setting forth Magistrate Morgan's oral rulings was placed in evidence. Paschal had the burden of proof on this issue and failed to satisfy it.

Rule 2(d), SCRCrimP, provides that "[a]fter concluding the [preliminary] hearing the magistrate shall transmit forthwith to the Clerk of the Court his findings together with all papers in the hearing." Rule 2(d), SCRCrimP. Consequently, a magistrate is required to issue his written ruling following the preliminary hearing. That written ruling is the appropriate evidence to submit to show the magistrate's decision and, in this case, the basis for the dismissal of the charges. Paschal never introduced any such evidence.

Instead, Paschal's counsel was allowed to question witnesses to confirm that the charges had been dismissed at the preliminary hearing, but he never elicited testimony that provided the magistrate's basis for the dismissal. Nor could he do so. No witness is competent to testify as to the legal basis of the magistrate's ruling.⁹ Instead, Paschal argued at the directed verdict stage that a finding of no

⁹ This Court has held that "[a]n oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation." *Brailsford v. Brailsford*, 380 S.C. 443, 669 S.E.2d 342, 346 (Ct. App. 2008).

probable cause was the only basis for a dismissal at a preliminary hearing. Sheriff Lott disputes that. In fact, Rule 2(a), SCRCrimP, does not limit a preliminary hearing to issues of probable cause, and in fact, a magistrate may dismiss for lack of jurisdiction at that stage or any stage of the proceedings. *See, State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002).

In a pre-trial colloquy with Judge Keesley, counsel addressed whether the transcript of the preliminary hearing would be admitted into evidence. Counsel for Sheriff Lott indicated that he would be objecting to "the introduction of any portion of that transcript other the very last portion where Mr. Moore, Ms. Paschal's attorney at that hearing, makes his motion for a dismissal initially for lack of probable cause and the judge rules on that, and then Mr. Moore argues another ground and then the judge ultimately dismisses it without really saying why he has dismissed it." (R. 84). However, despite an agreement to introduce the magistrate's oral rulings, Paschal never introduced that portion of the transcript.

Later, during the discussion of the directed verdict motions, Judge Keesley asked Paschal's counsel, "what did [the magistrate] say in the transcript?" Paschal's counsel responded: "He basically listened to the argument and listened to everything, and in the end, he basically said, I'm dismissing it. The words were, I'm dismissing it." (R. 740). That recitation is not entirely consistent with that offered by Sheriff Lott's counsel, but it is an acknowledgement from Paschal's

counsel that there is no definitive evidence in the record as to the basis for the magistrate's ruling.

Nonetheless, most telling are Judge Keesley's comments during the discussion of directed verdict motions at the close of all evidence. When Paschal's counsel again argued that the charges were "dismissed by virtue of a finding of no probable cause," Judge Keesley responded: "Well, that's your statement." (R. 856). Judge Keesley then elaborated as follows:

And I've heard you tell me that the only way the magistrate can dismiss it under Rule 2 is for lack of probable cause. And I've heard Mr. Frawley tell me that if you read the transcript of that proceeding, you'll see that when the motion was made to dismiss it for lack of probable cause, it was denied. And I've heard him tell me that you made a motion then to dismiss for jurisdiction -- lack of jurisdiction and it was -- and he -- and the judge said, I'm going to dismiss it. *There is no clear indication to me as to what ground the judge dismissed it on.* And if the judge was wrong, he was wrong. *But that doesn't change the fact that he may have dismissed it for some other reason in his mind.* Whether he had the authority to dismiss it on jurisdiction, which I -- again, that will take a lot of research -- is neither here nor there.

(R. 856-857). (Emphasis added). As the highlighted lines demonstrate, Judge Keesley acknowledged that given the record at the close of all evidence he did not know on what basis the magistrate dismissed the charges. If Judge Keesley did not have knowledge of the magistrate's ruling, neither did the jury. The record bears that out. Paschal never presented any evidence that the magistrate made a finding

of no probable cause in dismissing the warrants. Without any evidence as to the magistrate's ruling, Paschal has not satisfied her burden of proof to show that the charges were dismissed for reasons which imply or are consistent with innocence. Therefore, for this additional reason, Judge Keesley should have dismissed the malicious prosecution claim.

III. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort.

Kay Paschal also alleged a cause of action for abuse of process against Sheriff Lott. "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562, 566 (Ct. App. 2006). A plaintiff alleging abuse of process must prove two essential elements: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. American Medical International, Inc.*, 328 S.C. 128, 492 S.E.2d 103, 107 (1997).

"An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562, 566 (Ct. App. 2006). "The tort centers on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a

collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club." *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128, 134 (2014). "Regardless, there is no liability when the process has been carried to its authorized conclusion, even though with bad intentions." *Guider*, 635 S.E.2d at 566. *See also, Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984); *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 451 S.E. 907 (Ct. App. 1994).

Quite simply, there is no evidence in the record that would support a finding that Sheriff Lott or his deputies had an ulterior purpose by seeking the issuance of the two arrest warrants. There is no evidence of any collateral advantage – such as the payment of money or surrender of property – that Sheriff Lott sought by use of the arrest warrants. To the extent that Paschal argues that the collateral advantage is tied to the Probate Court proceedings involving Paschal and the Wallace children, Judge Keesley has rejected that claim and correctly so. In his post-trial order, Judge Keesley writes as follows:

The court does have serious concerns with the repeated focus by the Plaintiff on aspects that dealt with missing Probate Court hearings and her loss of a claim related to the estate. In the court's view, these claims were largely unproven to the extent that there was not sufficient competent evidence on that subject for the jury to consider them as being proximately caused by any wrongdoing on the part of the Defendant.

(R. 5).

The Supreme Court has explained that the abuse of process is "a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693, 694 (1967). There is, however, no evidence of any "negotiation" between Paschal and the sheriff deputies. The Sheriff's Department received a report of potential criminal activity, conducted an investigation and sought arrest warrants after consultation with two different solicitor's offices. There was no extortion; there was no attempt to gain any type of collateral advantage. Instead, the facts of this case are in line with "the normal police investigative procedure" which this Court was careful to exempt from the tort of abuse of process in *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211, 215 (Ct. App. 2008).

In addition, the evidence in the record is undisputed that the arrest warrants issued by Magistrate Scott Whittle were carried to their authorized conclusion. Those warrants were issued by Magistrate Whittle upon a showing of probable cause. The warrants were served on Paschal by a Lexington County deputy. She thereafter requested and received a preliminary hearing at which she was represented by counsel. The two charges were then dismissed by the magistrate. Consequently, the process, i.e., the arrest warrants, were carried to their authorized conclusion, and hence, under the authority of *Guider*, *Rycroft*, and *First Union*, there can be no liability for abuse of process.

Likewise, there is no evidence in the record that would support a finding that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding. Frankly, it is unclear what Paschal's allegation may be in this regard. It is presumed that Paschal relies on her incorrect interpretation and application of Section 22-5-110 for proof of this element. However, as already discussed at length above, that interpretation of Section 22-5-110 was incorrect. Neither Sheriff Lott, Lt. Scott or anyone with the Sheriff's Department caused Magistrate Whittle to issue arrest warrants in lieu of a courtesy summons. In fact, existing authority consisting of the South Carolina Bench Book for Summary Court Judges and opinions issued by the South Carolina Attorney General have stated that a courtesy summons is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Yet, neither of those elements is present here. Under existing law, the use of courtesy summons was not an option. Moreover, there is no evidence that Lt. Scott had any control over what type of charging document the magistrate would choose to issue.

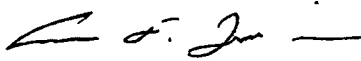
Based on the foregoing, Sheriff Lott submits that Judge Keesley erred in denying his directed verdict and JNOV motions. The abuse of process claim should have been dismissed for lack of proof.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Leon Lott respectfully requests that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute.

Respectfully submitted,

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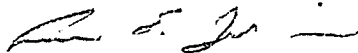
July 22, 2016

CERTIFICATE OF COUNSEL

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JUL 22 2016
SC Court of Appeals

The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Final Appellant's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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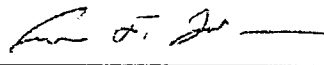
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CERTIFICATE OF COMPLIANCE

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The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Appellant's Brief of Appellant-Respondent complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

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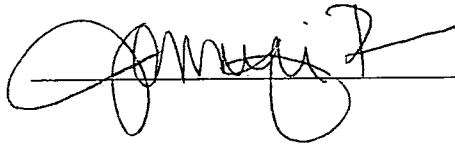
JUL 22 2016

SC Court of Appeals

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent, Leon Lott, does hereby certify that service of **Appellant's Brief of Appellant-Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of July 2016:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001153

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JUL 19 2016
SC Court of Appeals

Kay F. Paschal.....Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina.....Appellant/Respondent.

**RESPONDENT/APPELLANT KAY F. PASCHAL'S
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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN REDUCING THE JURY'S VERDICT TO \$300,000.00 DOLLARS?
2. DID THE TRIAL COURT ERR IN RULING THAT THE \$300,000.00 DOLLAR CAP ON DAMAGES APPLIED INSTEAD OF A \$600,000.00 CAP ON DAMAGES?

STATEMENT OF THE CASE

Respondent/Appellant Kay F. Paschal commenced this action against Appellant/Respondent Leon Lott alleging causes of action against him for false arrest, malicious prosecution, abuse of process, negligence and civil conspiracy. (R. p. 16). Appellant/Respondent answered the Complaint and asserted a counterclaim against Ms. Paschal for Abuse of Process. (R. p. 26). The parties subsequently engaged in written discovery as well as discovery depositions.

The case was tried before the Honorable William P. Keesley and a jury on July 21-25, 2014. At the close of the Plaintiff's case and again at the close of the evidence, Sheriff Lott moved for a Directed Verdict on various grounds. (R. p. 698, line 3 – p. 699, line 15). The Court granted Defendant's Motion as to Plaintiff's False Arrest Cause of Action. All remaining motions were denied. (R. p. 751, line 23 – p. 756, line 19) (R. p. 770, line 17-20).

At the close of the evidence, Plaintiff moved for a Directed Verdict as to the Defendant's counterclaim. (R. p. 852, line 11 – p. 855, line 3). This motion was granted by the Court. (R. p. 855, lines 4 - 22). Defendant renewed his Directed Verdict Motions. (R. p. 860, line 21 - p. 869, line 20). The Court denied the Defendant's Motions as to the causes of action for abuse of process and malicious prosecution. (R. p. 869, lines 21-24). Plaintiff withdrew her cause of action for negligence. (R. p. 870, lines 12-13).

The Plaintiff's causes of action for malicious prosecution and abuse of process claims were submitted to the jury. After deliberation, the jury returned a verdict in favor of Plaintiff on both claims and awarded Plaintiff actual damages of 1.61 Million dollars. (R. p. 950).

The Defendant subsequently filed three post-trial motions: a Motion to Reduce Verdict, or in the Alternative for a New Trial (New Trial *Nisi Remittitur*); Motion for JNOV, or in the Alternative for a New Trial Absolute; and Motion for a New Trial Pursuant to the Thirteenth Juror Doctrine (R. pp. 41-75). On December 9, 2014, Judge Keesley issued his Order reducing the Plaintiff's award to Three Hundred Thousand and No/100 (\$300,000.00) dollars. All of the Defendant's remaining Motions were denied. (R. p. 1).

Plaintiff timely filed a Motion to Reconsider. (R. p. 76). On April 27, 2015, Judge Keesley issued his Order denying both Motions for Reconsideration. (R. p. 12). On June 10, 2015, after the Appellant/Respondent filed his Notice of Appeal, the Respondent/Appellant filed her Cross Appeal. (R. p. 1148) (R. p. 1170).

STATEMENT OF THE FACTS

This is a very serious case which involves humiliation and abuse suffered by Respondent/Appellant Kay Paschal ("Kay"), a long time member of the South Carolina Bar. The abuse came at the hands of the Appellant/Respondent Leon Lott, Duly Elected Sheriff of Richland County, South Carolina ("Sheriff Lott") the operating at all times under color of State Law. Kay brought suit against the Sheriff Lott alleging that Appellant/Respondent conspired to, and did intentionally, abuse her by wrongful law enforcement tactics used to intimidate and to effect/alter the outcome of a Richland County Probate Court proceeding (R. p. 16). Kay's case was tried for approximately five (5) days before a Lexington County jury. The jury found for her on her causes of action for abuse of process and malicious prosecution (R. p. 950). The jury awarded Kay 1.6 Million dollars in actual damages (R. p. 950).

Kay Paschal is an elderly member of the South Carolina Bar. (R. p. 467. lines 18-19). Throughout her legal career she worked representing indigent citizens of South Carolina. (R. p. 480, lines 12-24). She also worked for the University of South Carolina. (R. p. 480, line 25 – p. 481, line 16). She operated her own law practice for a while. (R. p. 481, lines 17-19).

Apart from her law practice, Kay otherwise lived a quiet life taking care of her family and her pets. (R. p. 480, line 5 – p. 481, line 16). In her later years, she developed a relationship with David Wallace (“David”). In 2001 or 2002 she did some legal work for him and for his company. (R. p. 499, lines 13-17). In 2002, David hired Kay as his secretary. (R. p. 499, lines 22-25; p. 500, line 1). As David’s secretary Kay operated his office, paid his bills, kept his books and did his correspondence. (R. p. 499, lines 22-25; p. 500; line 1) (R. p. 511, lines 6-16). She did not perform any legal work for him or his business once she went to work for him as his secretary. (R. p. 500. lines 2-6).

Later, she and David developed a romantic relationship. At the time Kay was living in a small house she owned in Lexington County. (R. p. 496, lines 9-19) (R. p. 497, line 25 – p. 518, line 5). Kay moved in with David in 2003 at his house in Forest Acres, South Carolina. (R. p. 498, lines 8-12). Kay and David lived there together until after his death in 2011 when she was evicted from their Forest Acres home by his children. (R. p. 498, lines 19-21).

Kay and David worked together in his yard creating a “showcase” home. (R. p. 511, lines 20-25) (R. p. 512, lines 1-2). They owned a number of pets together including cats and a pond full of Koi Fish. (R. p. 494, lines 18-25). (R. p. 495, line 1) (R. p. 495,

lines 5-11). They took many vacations together. They maintained separate and joint bank accounts. (R. p. 508, lines 6-11).

Kay and David considered themselves to be husband and wife, although they never formally married. (R. p. 486, lines 6-11). Ms. Paschal wore a ring given to her by David. She adopted his last name as her own. (R. p. 467, lines 23-25; R. p. 468, line 7. Many of their mutual friends believed them to be husband and wife. (R. p. 613, line 25 – p. 614, line 4). The jury heard testimony that on the Friday prior to David's stroke, he and Kay applied for a marriage license. (R. p. 513, lines 11-25) (R. p. 514, lines 1-4).

In April of 2010, David went to Providence Hospital for insertion of a stent in his carotid artery. (R. p. 512, lines 21-25) (R. p. 513, lines 1-10). It was anticipated that this would be a same day surgery or, at most, David would only be hospitalized overnight. (R. p. 514, lines 5-7). No problems were anticipated or expected. (R. p. 514, lines 5-7). Unfortunately, shortly after the procedure David suffered a debilitating stroke which left him paralyzed. (R. p. 515, lines 3-12) (R. p. 471, lines 20-25) (R. p. 472, lines 1-7). This complication resulted in a lengthy hospital stay, both at Providence Hospital and at HealthSouth Rehabilitation Hospital. (R. p. 515, line 16 – p. 516, line 5).

Sometime prior to the Providence/HealthSouth hospitalizations, David executed a Power of Attorney ("POA") giving Kay Power of Attorney. (R. p. 510, lines 16-25) (R. p. 954). The POA was prepared in the office and given to David. He took the POA and had it executed outside of the presence of Kay and away from the office. (R. p. 501, lines 1-19). Kay had absolutely no involvement in its execution by David. (R. p. 506, lines 7-22). She testified that she did not know where he had it executed or any of the witnesses to the execution of the agreement. (R. p. 501, lines 17-19).

David brought the executed POA back to the office and gave it to Kay who put it in a file. She did not file it. During David's hospital stay, she was instructed by his medical care providers to file it. (R. p. 473, lines 20-25) (R. p. 474, lines 1-8). After filing the POA, Ms. Paschal signed David's name on checks as she had always done, even in front of David's two children. (R. p. 474, lines 1-5) (R. p. 507, lines 1-5) (R. p. 506, line 1). The Wallace children were well aware of the Power of Attorney and during their father's lifetime raised no issue with Kay using it. (R. p. 525, lines 13-17).

David was discharged from the hospital with significant physical disabilities and limitations. As a result of the stroke he could not walk. (R. p. 471, line 20 – p. 472, line 22). He could not feed himself. He had issues with bowel control. (R. p. 517, lines 2-12). He was, however, able to understand and converse with others around him even though his speech was somewhat impaired. (R. p. 516, lines 6-24). Individuals who spoke to him were able to understand him and carry on a conversation with him. (R. p. 444, lines 5-14) (R. p. 471, line 20 – p. 472, line 7). David was never declared mentally incompetent in any way prior to his death. (R. p. 192, lines 16-22) (R. p. 193, lines 18-23) (R. p. 194, line 1). He was never declared to be a vulnerable elderly adult. (R. p. 193, lines 12-17). No guardian was ever appointed for him during his lifetime. (R. p. 195, lines 3-5).

After the stroke, Kay was David's primary caregiver. While he was hospitalized she remained at the hospital with him. (R. p. 528, lines 1-5). Kay hired two caregivers to assist her with David's care during the day. (R. p. 517, lines 13-23). At night, Kay was his primary caregiver. She drove him to his rehabilitation/physical therapy/doctor's visits. She took him on outings. She prepared his meals. (R. p. 519, lines 7-12) (R. p.

518, lines 13-23). She changed David's dressings and gave him his medications. (R. p. 528, lines 1-18). She did all of the laundry. (R. p. 464, line 25 – p. 470, line 3). She purchased a queen sized hospital bed and slept with him at night in case he needed her. (R. p. 471, lines 7-19).

She also oversaw modifications to the house which included replacing carpet with linoleum (to make it easier for him to get around in a wheelchair), constructing an indoor ramp, and contacting an architect to make the bathrooms more accessible. She purchased a refrigerator for protein drinks for David. (R. p. 469, lines 15-25) (R. p. 470, lines 10-16). Kay purchased a Hoyer lift to assist in getting David in and out of bed. (R. p. 464, line 15 – p. 471, line 12).

One of Kay's many responsibilities was to drive David to and from his rehabilitation/doctor's appointments. She also drove him to dinner and on outings. (R. p. 518, lines 14-21). Because of his paralysis and size (compared to her own) she had difficulty getting him in and out of their vehicle in his wheelchair. (R. p. 518, line 22 – p. 519, line 2). She went to Carolina Mobility and spoke with Tim Petersen, the general manager, about purchasing a handicap accessible van. (R. p. 434, lines 10-12) (R. p. 442, lines 3-9). Mr. Petersen left the dealership with Kay and picked up David who was at a rehabilitation appointment. The three of them returned to Kay and David's residence. (R. p. 442, line 21 – p. 443, line 2). Mr. Petersen assisted Kay in getting David out of the van and into the house.

Mr. Peterson spoke with David and Kay regarding their choice of handicap accessible vans. David was present and participated in the decision as to which van they preferred. Mr. Petersen was able to verbally communicate with David. (R. p. 443, lines

19-23). He was able to understand what David was saying to him. (R. p. 443, lines 19-23). David was able to communicate what he liked or disliked in a particular van. (R. p. 444, lines 19-23). (R. p. 444, lines 11-16). David and Kay decided to purchase a handicap accessible Toyota van. Kay consummated the transaction, which involved trading in a Cadillac, using her Power of Attorney. (R. p. 189, lines 11-22) (R. p. 436, lines 17-25). She used David's money to pay for the van. (R. p. 520, lines 6-25; R. p. 521, lines 1-3) (R. p. 523, lines 9-13) (R. p. 966) (R. p. 967) (R. p. 968). David was aware of this transaction and aware of the fact that his money and the Cadillac were being used to purchase the van. (R. p. 523, lines 11-13). (R. p. 447, lines 19-24). Kay testified that she would not have consummated the transaction if David had not wanted her to do so. (R. p. 523, lines 3-7).

All of the proceeds from the Cadillac were applied to the price of the van. Kay did not realize any of the proceeds from the sale of the car. (R. p. 479, lines 5-22). Mr. Petersen, as was his customary practice, recommended that the van be titled as "Mr. Wallace or Ms. Paschal" to make transfer of the van easier for the "surviving party." (R. p. 435, lines 16-25) (R. p. 436, lines 1-8).

Kay used the van to transport David to his appointments and on outings. She only used the van without David to buy groceries. She did not use the van for any personal reasons or use. (R. p. 434, lines 1-12).

On February 20, 2011, David died leaving an estate of approximately 6 Million dollars. (R. p. 512, lines 17-22). At the time of his death, David had two adult children, a son Jeffrey Wallace and a daughter Elizabeth Wallace. (R. p. 189, lines 1-10). The jury heard testimony that Elizabeth is a lawyer and Jeffrey at one time worked for the CIA.

During his lifetime, the children's contact with David was limited. The jury heard testimony that they rarely visited David. The jury heard testimony that they did not participate in his care, instead leaving it to Kay. (R. p. 519, lines 3-12). However, after his death they immediately instituted criminal proceedings against Kay alleging abuse and neglect. (R. p. 161, lines 11-22). They also initiated proceedings against Kay in the Richland County Probate Court. (R. p. 528, lines 23-25).

Leon Lott is the duly elected Sheriff of Richland County. He hired a deputy named Heidi Scott (now Heidi Scott Jackson). All of Lieutenant Jackson's actions were carried out in her capacity as a deputy for the Richland County Sheriff's Department. (R. p. 96, lines 3-5) (R. p. 97, lines 11-14) (R. p. 98, lines 7-18). The jury heard evidence that Lt. Jackson was never properly deputized. South Carolina Code Section 23-27-70 requires each deputy sheriff to post a surety bond prior to functioning as a deputy. South Carolina Code Section 23-11-30 also requires a bond on the part of the Sheriff. Neither Sheriff Lott nor Deputy Jackson had any such surety bond.

The Wallace children's criminal complaint against Kay ultimately found its way to Lt. Heidi Jackson. The jury heard evidence that Lt. Jackson had very little training as a law enforcement officer. She did have training and experience as a victim's advocate. (R. p. 107, lines 14-20). Lt. Jackson was assigned to the Wallace case. She became very close to the Wallace children during the investigation. By her own admission, she worked closely with them. (R. p. 147, lines 16-20) (R. p. 148, line 3 – p. 151, line 7). As set forth below, the jury heard ample evidence that Lt. Jackson did everything in her power to provide the Wallace children an advantage in the Probate Court proceedings.

Lt. Jackson's first interaction with Kay occurred on March 8, 2011, less than three weeks after David's death. At that time, Kay was at the home she shared with David with his children explaining computer passwords and the property owned by David at the time of his death. (R. p. 529, line - p. 531, line 7). Lt. Jackson showed up with Richland County Sheriff's Department officers and a search warrant. This was a complete surprise to Kay, but not to the Wallace children. (R. p. 542, lines 13-18). The Wallace children appeared to Kay be very friendly with Lt. Jackson and the deputies. There appeared to Kay to be a "special relationship" between the Wallace children, Lt. Jackson and the Richland deputies. (R. p. 542, lines 3-18). The jury heard evidence that the Wallace children appeared to not only assist Lt. Jackson with her search, but to direct it. (R. p. 531, lines 8-16) (R. p. 531, line 25 - p. 532, line 16). On at least one occasion during the search, the children personally found items and handed them to Lt. Jackson. (R. p. 545, lines 1-7).

In addition, during the search, Lt. Jackson and her cohorts took computers, printers, cameras and photo cards. Many of the pictures seized during the search were pictures of Kay and David's pets and pictures that Kay had taken during her vacation trips with David. These belongings had great sentimental value to Kay. (R. p. 530, lines 11-24) (R. p. 545, lines 8 -17). None of these seized items have ever been returned to her. (R. p. 545, lines 18-23).

As set forth above, Lt. Jackson was a Richland County deputy. She had absolutely no authority at all in Lexington County. (R. p. 101, lines 5-25) (R. p. 102, lines 21-25). Lt. Jackson testified that she is aware that she had no jurisdiction in Lexington County. (R. p. 101, line 10 - p. 103, line 21). She was never asked by anyone

in Lexington County to participate in any ongoing Lexington County investigation. (R. p. 103, lines 22-25).

Notwithstanding this fact, Lt. Jackson arranged for a second search of Kay's former residence on Kitty Hawk Drive in Lexington County on May 8, 2011. (R. p. 117, line 18 - p. 120, line 21). (R. p. 969). The search warrants are directed to "any bonded law enforcement officer of the aforementioned county." (R. p. 119, lines 17-25). (R. p. 969). As set forth above, Lt. Jackson was not a bonded law enforcement officer and she was not an officer of Lexington County. (R. p. 120, lines 5-15) (R. p. 139, lines 20-22). Despite this obvious deficiency, Lt. Jackson conducted the search and seized Kay's property located in Lexington County anyway.

This search occurred immediately after Kay had been evicted from the Forest Acres home in the Probate Court proceeding initiated by the Wallace children. (R. p. 548, line 2 - p. 549, line 6). Kay was in the process of trying to convert her former Lexington County residence, which had been used for storage during the years she lived with David, back into a habitable residence when Lt. Jackson and Richland County Sheriff's Department officers arrived at her house. Like the first search, this second search was done on the authority and direction of Lt. Jackson and carried out solely by Richland County Sheriff's Department officers. (R. pp. 118-119) (R. p. 138, lines 12-16) (R. p. 555, lines 9-16). Like the first search, the Wallace children, Kay's adversaries in the Probate Court proceeding, were present when this search occurred. (R. p. 549, lines 7-24). Once again this search (which was very surprising to Kay) did not appear to be a surprise to the Wallace children. (R. p. 549, lines 15-17). Once again they participated in the search and assisted Lt. Jackson and her cohorts in it. (R. p. 550, line 21 - p. 551, line

3) (R. p. 551, lines 12-24). Kay testified that during the search Lt. Jackson laughed and joked with Elizabeth Wallace. (R. p. 551, line 23) (R. p. 552, line 18 – p. 553, line 12).

As she had done during the earlier search in Richland County, Lt. Jackson took computers and cameras containing items of great sentimental value to Kay including family photographs, not just of David but also of her own family. The items seized from Kay's Lexington County home were taken to the Richland County evidence room by Lt. Jackson. (R. p. 173, lines 3-4). None of these items were ever returned to Kay. (R. p. 555, line 23 – p. 556, line 23). Kay has never received any explanation from the Sheriff's Department as to why they will not return what has been seized. These items have been in the possession of the Sheriff's Department for years with no explanation or excuse. (R. p. 578, lines 15-21).

The jury heard evidence that these searches were done close to Probate Court hearings. The jury heard ample evidence that it could have concluded that the two searches were done in a way which deprived Plaintiff of relevant evidence to present to the Probate Court (R. p. 545, line 21 – p. 546, line 3) (R. p. 546, line 19 – p. 547, line 2). The jury heard testimony regarding the impact of the illegal search and seizure and the fact that it (along with the Richland County search) resulted in the Plaintiff being unable to properly present evidence to the Probate Court (R. p. 546, line 19 – p. 547, line 2). Kay did not have access to her evidence and she did not have access to her records.

Lt. Jackson's improper involvement in this case did not end with the illegal search. On November 16, 2011, a hearing to remove Kay as the administrator and trustee of David Wallace's estate was scheduled in the Richland County Probate Court. (R. p. 577, lines 5-23) (R. 968). After the illegal search and seizure, Lt. Jackson, with the

knowledge, permission and ratification of Sheriff Lott, participated in the preparation of two arrest warrants in Lexington County for Kay's arrest. (R. p. 104, line 21 – p. 105, line 6). The charges had previously been investigated in Lexington County by Lexington County authorities. (R. p. 203, lines 6-23). Steve Baumgartner, an 18 year employee of the Lexington County Sherriff's Department, thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Kay with any wrongdoing or to arrest her. (R. p. 206, line 18 – p. 207, line 7) (R. p. 218, line 8 – p. 221, line 11) (R. p. 360, line 23 – p. 361, line 10) (R. p. 365) (R. p. 979). Despite this finding by the investigating authorities in Lexington County Law Enforcement, Lt. Jackson continued her crusade against Kay.

The two warrants were sworn to by Lt. Jackson. (R. pp. 977-978) (R. p. 104, lines 21-23). They were issued solely on information supplied to the issuing Judge (Judge Whittle) by Lt. Jackson. (R. p. 105, lines 1-10). The jury heard evidence that Lt. Jackson did not know the meaning of foundational words that she used in the affidavit to obtain the arrest warrant. (R. p. 1). These warrants resulted in Kay turning herself in and being arrested immediately before another very important Probate Court hearing. There was no proof Kay did anything wrong and the jury heard testimony that Lt. Jackson withheld information from the Lexington County Magistrate when she got the warrant (R. p. 1). She did not tell the Lexington County Magistrate that Lexington County had already investigated these charges and found no probable cause (R. p. 1). In securing the warrants, Lt. Jackson did tell the Magistrate that she had spoken with Dayton Riddle, a solicitor in Lexington County who had raised concerns about Lt. Jackson swearing out a warrant in Lexington County (R. p. 1).

As a result of the arrest warrants, Lt. Jackson called Kay on November 15th, the day before a scheduled Probate Court hearing, and informed her of the outstanding warrants and that she needed to go to the Lexington County jail the next morning at 5:30 AM. (R. p. 559, line 5 – p. 579, line 2) (R. p. 975). Kay went to the jail at the direction of Lt. Jackson at 5:30 AM on the following day (November 16th) and was arrested. As a result of her arrest and incarceration she was not able to attend the Probate Court hearing. (R. p. 561, line 25 – p. 561, line 16). The matter was heard in Probate Court in Kay's absence. (R. p. 564, lines 15-19).

The jury found there to be no coincidence between the fact the arrest happened the day before the Probate Court case. The jury heard evidence that every time Kay was scheduled to do something in Probate Court, the Richland County Sheriff, specifically Lt. Jackson, working closely with the Wallace children, did something to frustrate her efforts to secure justice in the Probate Court.

The jury heard ample evidence of the degradation that Kay, an officer of the South Carolina Courts, experienced during her 40 hours in the Lexington County jail. (R. p. 564, line 19). Kay was booked, photographed and fingerprinted. (R. p. 562, line 25 – p. 563, line 5). Her bond was set for \$50,000, in part due to testimony from Elizabeth Wallace. (R. p. 564, lines 4-14). Kay did not have the money to post bail. (R. p. 564, lines 13-17). She was initially given a jumpsuit to wear, but due to the fact it needed to be washed, she had to turn it in after the bond hearing and was given a sheet to wear. (R. p. 563, lines 6-19). She was forced to spend the night in jail with only a sheet (no bra or panties) sleeping on a mat on the floor with other prisoners. (R. p. 565, line 4 – p. 567,

line 9). The jury heard ample evidence of the fear, anxiety, humiliation and shock that this caused Kay. (R. p. 565, line 4 – p. 567, line 9).

A bond modification hearing was held on November 17, 2011, before the Honorable Knox McMahon, Presiding Judge of Lexington County. (R. p. 568, line 3 – p. 571, line 8) (R. p. 979). To get to the hearing, Kay had to walk through the Courthouse in a prison jumpsuit. She suffered the humiliation of seeing faces she had worked with in her long years as a practicing attorney in Lexington County. The jury heard testimony that neither Lt. Jackson nor any of the Wallace children were present at the bond modification hearing. Judge McMahon's Order granting Kay's Motion to Modify her Bond expressed concerns about the fact that Kay had been arrested in Lexington County on arrest warrants signed by a Richland County Deputy "apparently functioning in Lexington County." His Order raised questions as to the legality of the warrants. (R. p. 570, lines 2-8). Judge McMahon ordered Kay's release on a \$1,000.00 personal recognizance bond on each count. (R. p. 570, lines 22-25) (R. p. 979).

The charges brought against Kay by Lt. Jackson were ultimately dismissed for lack of probable cause in January of 2012. (R. p. 175, lines 19-24). (R. p. 576, lines 16-21) (R. p. 579, lines 7-23). Based on the lack of evidence and the lack of jurisdiction, the Honorable Gary Morgan, Magistrate for Lexington County, dismissed the criminal warrants in Lexington County. (R. p. 115, lines 7-10) (R. p. 381, lines 1-2) (R. p. 383, lines 1-3).

Sadly the dismissal of the Lexington County charges for lack of probable cause did not bring this matter to an end. In December 2013, after Kay commenced this action, two additional warrants for "forgery, no dollar amount" were sworn out by the Richland

County Sheriff's Department. (R. p. 176, lines 21-25) (R. p. 177, lines 1-11) (R. p. 579, line 15 – p. 581, line 24) (R. p. 1016-1017). Howard Hughes, an employee of the Sheriff's Department prepared these affidavits "upon information and belief." (R. p. 1016-1017). There are no factual averments in the compliant, nor is there any indication that Mr. Howard Hughes had any first hand knowledge of any of the claimed allegations against Kay. Kay has never been given any information as to what these charges are or what they involve. Her efforts to get a preliminary hearing as to these charges have been unsuccessful. (R. p. 581, line 8 -19). These cases have languished for over two years.

As a result of the Arrest Warrants sworn out by Lt. Jackson, Kay had to report her arrest to the South Carolina Supreme Court. Her license to practice law was suspended and has remained suspended since that date. (R. p. 475, lines 12-25) (R. p. 479, lines 7-10) (R. p. 987). The jury heard evidence of the damages suffered by Kay as a result of her arrest including embarrassment, humiliation, and loss of income (R. p. 1).

STANDARD OF REVIEW

At the close of the evidence Sheriff Lott moved to Reduce the Verdict by a New Trial *Nisi* (New Trial *Nisi Remittitur* or in the alternative to impose the statutory cap of \$300,000.00 (R. p. 1) (R. pp. 41-75). The Trial Court's Order denied Sheriff Lott's Motion for New Trial *Nisi Remittitur* but granted his Motion to impose the statutory cap of \$300,000.00 (R. p. 1). The Plaintiff timely moved for Reconsideration. (R. p. 76). The Plaintiff's Motion was denied. (R. p. 12).

The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law."

Chapman v. Upstate RV & Marine, 364 S.C. 82, 88–89 610 S.E.2d 852, 856 (Ct.App.2005) (citing *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct.App.1996)); *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct.App.2004). The Trial Judge's Order granting Sheriff Lott's impose the statutory cap of \$300,000.00 are clearly erroneous, are controlled by an error of law and should be reversed by this Court.

LEGAL ARGUMENT

1. **The statutory damage caps of section 15-78-120 do not apply to intentional torts and therefore do not apply to this case.**

The Trial Court erred in granting Appellant/Respondent Lott's Motion for a reduction of the jury's verdict on the grounds that the damage cap for negligent conduct in the South Carolina Tort Claims Act ("SCTCA") applies in this case. (R. p. 1). The statutory cap only applies in cases where the governmental entity has injured the plaintiff by an act of negligence. The cap does not apply in this case because the jury rendered a verdict on two intentional torts, and not negligence. In fact, the negligence claim was withdrawn after Appellant/Respondent's counsel argued there was no proof of negligence. (R. p. 870, lines 12-13). Sheriff Lott's motion to reduce the verdict should have been denied and the Trial Court committed an error of law in ruling otherwise. (R. p. 1).

An injured party may sue a governmental entity for all torts, intentional and negligent. Pursuant to section 15-78-40, "[a] governmental entity [is] liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." The government's liability in torts

includes liability for the intentional torts of malicious prosecution and abuse of process. *McBride v. School Dist. Of Greenville County*, 389 S.C. 546, 689 S.E.2d 845 (Ct.App. 2010). *See also, Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct.App. 2008), which involved the identical Appellant/Respondent's firm and the same Appellant/Respondent at bar here.

Whether the damages caps apply in this case (or any case) turn upon the plain language of the damages cap statute. While it is true that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature, the court cannot change the plain definition of a statutory term. *Hodges v. Rainey*, 341 S.C.79, 533 S.E.2d. 578 (2000); *In re Vincent*, 333 S.C.233, 509 S.E.2d. 261 (1998). The General Assembly's intent must be ascertained primarily from the plain language of the statute in question. *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d. 369 (Ct.App. 2005). Under the plain meaning rule it is not the Court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of construction and statutory interpretation are not needed and the court has no right to impose another meaning. Once the legislature makes a choice, there is no room for the Courts to imposed a different judgment or meaning based on their own notions of public policy. *South Carolina Farm Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (Ct.App. 1998).

Whether the damages caps apply in this case turns upon the plain language of the damages cap statute. There is no question the damages cap statute is triggered by an "occurrence." Pursuant to section 15-78-120:

[N]o person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss

arising from a single *occurrence* regardless of the number of agencies or political subdivisions involved.

S.C. Code § 15-78-120(a)(1) (emphasis added).

An occurrence is a term of art specifically defined within the SCTCA:

(g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of *negligence*.

S.C. Code § 15-78-30(g) (emphasis added).

Read together, the statutory damage caps only apply to causes of action for negligence:

[N]o person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from [an unfolding sequence of events which proximately flow from a single act of *negligence*] regardless of the number of agencies or political subdivisions involved.

S.C. Code §§ 15-78-30(g) and 120(a)(1) (emphasis added).

"[I]n construing a statute its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit *or expand* the statute's operation." *McGill v. University of South Carolina*, 310 S.C. 224, 228, 423 S.E.2d 109, 111 (1992) (quoting *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900-901 (1988) (emphasis added)). To apply the statutory caps to intentional tort claims would improperly expand the statute's operation.

The use of the term negligence is clear and unambiguous. To read the SCTCA as a cap on damages for intentional torts in addition to negligence would disregard the stated definition of an occurrence and replace it with "any tort." If the General Assembly intended the cap in section 15-78-120 to include a cap on damages for intentional torts, it would not have limited the definition of an occurrence to include only acts of negligence.

The jury returned verdicts for Kay Paschal on causes of action for malicious prosecution and abuse of process, not negligence. "The gist of negligence is failure to observe a duty of care owed to the plaintiff by law. Negligence is determined by measuring the defendant's conduct against a standard of care, not by discovering his feelings towards the plaintiff (malice) or his subjective reasons for acting (motive)." *Snakenburg v. Hartford Cas. Inc. Co., Inc.*, 299 S.C. 164, 173, 383 S.E.2d 2, 7 (Ct.App. 1989).

There are a number of cases where the Court has reduced significant verdicts in SCTCA cases, but all of these cases involve allegations of negligence. There are also instances where the South Carolina Supreme Court has refused to apply a cap in cases against a government entity. In *McGill v. University of South Carolina*, the Court refused to apply the cap because the claim was brought pursuant to the Whistleblower Statute. "Had the legislature intended to limit the amount of damages to be recovered, it could have done so." *McGill v. University of South Carolina*, 310 S.C. 224, 228, 423 S.E.2d 109, 111-112 (1992).

Kay Paschal was not harmed by Appellant/Respondent Lott's negligence. She was systematically hounded, searched, interfered with, and arrested without probable cause by the Sheriff. These were covered intentional acts, not negligence. The Appellant/Respondent Sheriff Lott should not now be allowed to shield himself with a statute intended to cap damages for unintentional acts. The Trial Court's Order reducing her actual damages should be reversed and the full amount of the damages award reinstated.

Because the statutory caps in section 15-78-120 do not apply to actions involving intentional torts, the Trial Court should have denied Appellant/Respondent's motion to reduce the verdict and for new trial nisi remittitur. The Court's Order reducing the actual damages award and its Order denying Respondent/Appellant's Motion to Reconsider were clearly erroneous and should be reversed by this Court.

2. **Assuming the negligence damage caps do apply, the Appellant/Respondent is only entitled to a reduction to \$600,000 because the jury rendered a verdict in favor of the Plaintiff on two separate claims.**

While the undersigned counsel does not believe the Appellant/Respondent Lott is entitled to any reduction in the jury award due to the negligence caps of section 15-78-120, and believes the Court's Order to the contrary was erroneous, in the alternative, even if the caps do apply (which Respondent-Appellant strenuously denies) the jury rendered a verdict on two separate claims and therefore a reduction to \$600,000 would have been appropriate.

The second part of negligence cap statute reads as follows:

[T]he total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

S.C. Code § 15-78-120(a)(2).

The jury awarded a verdict for Kay Paschal on both claims for malicious prosecution and abuse of process. The malicious prosecution involved Sheriff Lott's harassment, search, and arrest of Kay Paschal without probable cause. The abuse of process was based upon Sheriff Lott's use of the legal process to interfere with and restrict Kay Paschal's ability to engage in civil litigation. While the improper conduct of Appellant/Respondent Lott in both of the causes of action is intertwined, the impact on

Ms. Paschal's life was distinct and the claims were distinct. It was admitted the damages calculations for the causes of action were identical.

Because the jury rendered verdicts on two separate claims involving separate and distinct causes of action, the individual cap applies to each individual claim and therefore the damages should only be reduced to \$600,000.

CONCLUSION

For the reasons set forth above, the Trial Judge committed a manifest error of law in granting the Appellant/Respondent Lott's Motion to reduce the jury's award of damages to \$300,000.00 dollars. His Order should be reversed by this Court and the original verdict amount of 1.6 Million dollars reinstated.

In the alternative, even if a reduction in damages pursuant to the statutory cap was proper (which the Respondent/Appellant submits it was not), then the Trial Judge erred in reducing the jury's damages award to \$300,000.00 and the Court should reverse the Trial Court's Order and set an award of \$600,000.00 dollars.

Respectfully submitted,

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West Columbia, South Carolina

July 18, 2016

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Common Pleas Court

William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001153

Kay F. Paschal..... Respondent/Appellant,

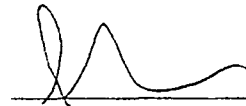
v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent/Appellant certifies that Respondent/Appellant
Kay F. Paschal's Final Brief of Appellant complies with Rule 211(b) SCACR.

Respectfully submitted,



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July 19, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Common Pleas Court

William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001153

RECEIVED
JUL 19 2016
SC Court of Appeals

Kay F. Paschal..... Respondent/Appellant,

v.

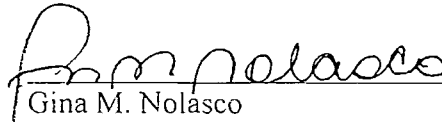
Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina Appellant/Respondent.

PROOF OF SERVICE

I, Gina M. Nolasco, an employee of the Moore Taylor Law Firm, P.A., certify that I have served Respondent/Appellant Kay F. Paschal's Final Brief of Appellant and Respondent/Appellant Kay F. Paschal's Final Brief of Respondent by United States mail, in an envelope with sufficient postage affixed there to, upon all counsel of record on July 19, 2016.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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Kay F. Paschal.....Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina.....Appellant/Respondent.

**RESPONDENT/APPELLANT KAY F. PASCHAL'S
FINAL BRIEF OF RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT PROPERLY INTERPRETED AND APPLIED CODE SECTION 22-5-110 TO THE FACTS OF THIS CASE
- II. THE TRIAL COURT PROPERLY DENIED SHERIFF LOTT'S DIRECTED VERDICT AND POST-TRIAL MOTIONS
- III. THE TRIAL COURT FOUND AMPLE EVIDENCE TO SUPPORT RESPONDENT/APPELLANT'S ABUSE OF PROCESS CLAIM

STATEMENT OF THE CASE

Respondent/Appellant Kay F. Paschal commenced this action against Appellant/Respondent Leon Lott alleging causes of action against him for false arrest, malicious prosecution, abuse of process, negligence and civil conspiracy. (R. p. 16). Appellant/Respondent answered the Complaint and asserted a counterclaim against Ms. Paschal for abuse of process. (R. p. 26). The parties subsequently engaged in written discovery as well as discovery depositions.

The case was tried before the Honorable William P. Keesley and a jury on July 21-25, 2014. At the close of the Plaintiff's case and again at the close of the evidence, Sheriff Lott moved for a directed verdict on various grounds. (R. p. 698, line 3 – p. 699, line 15). The Court granted Defendant's motion as to Plaintiff's false arrest cause of action. All remaining motions were denied. (R. p. 571, line 23 – p. 756, line 19) (R. p. 770, lines 17-20).

At the close of the evidence, Plaintiff moved for a directed verdict as to the Defendant's counterclaim. (R. p. 850, line 11 – p. 855, line 3). This motion was granted by the Court. (R. p. 855, lines 4 – 22). Defendant renewed his directed verdict motions. (R. p. 860, line 21 – p. 869, line 20). The Court denied the Defendant's motions as to the causes of action for abuse of process and malicious prosecution. (R. p. 869, lines 21-24). Plaintiff withdrew her cause of action for negligence. (R. p. 870, lines 12-13).

The Plaintiff's causes of action for malicious prosecution and abuse of process claims were submitted to the jury. After deliberation, the jury returned a verdict in favor of Plaintiff on both claims and awarded Plaintiff actual damages of 1.61 Million dollars. (R. p. 950).

The Defendant subsequently filed three post-trial motions: a Motion to Reduce Verdict, or in the Alternative for a New Trial (New Trial *Nisi* Remittitur); Motion for JNOV, or in the Alternative for a New Trial Absolute; and Motion for a New Trial Pursuant to the Thirteenth Juror Doctrine (R. pp. 41 - 75). On December 9, 2014, Judge Keesley, after hearing arguments of counsel, issued his Order reducing the Plaintiff's award to Three Hundred Thousand and No/100 (\$300,000.00) dollars. All of the Defendant's remaining motions were denied. (R. p. 1).

Plaintiff timely filed a Rule 59(c) Motion to Reconsider. (R. p. 75). On April 27, 2015, Judge Keesley issued his Order denying this motion. (R. p. 12). On June 10, 2015, after the Appellant/Respondent filed his Notice of Appeal, the Respondent/Appellant filed her Cross Appeal. (R. p. 1148) (R. p. 1170).

STATEMENT OF THE FACTS

This is a very serious case which involves humiliation and abuse suffered by Respondent/Appellant Kay Paschal ("Kay"), a longtime member of the South Carolina Bar. The abuse came at the hands of the Appellant/Respondent Leon Lott, Duly Elected Sheriff of Richland County, South Carolina ("Sheriff Lott"), operating at all times under color of State Law. Kay brought suit against Sheriff Lott alleging that Appellant/Respondent conspired to, and did intentionally, abuse her by wrongful law enforcement tactics used to intimidate and to effect/alter the outcome of a Richland County Probate Court proceeding. (R. p. 16). Kay's case was tried for approximately five (5) days before a Lexington County jury. The jury found for her on her causes of action for abuse of process and malicious prosecution. (R. p. 950). The jury awarded Kay 1.6 Million dollars in actual damages. (R. p. 950).

Kay Paschal is an elderly member of the South Carolina Bar. (R. p. 467, lines 18-19). Throughout her legal career, she worked representing indigent citizens of South Carolina. (R. p. 480, lines 12-24). She also worked for the University of South Carolina. (R. p. 480, line 25 – p. 481, line 16). She operated her own law practice for a while. (R. p. 481, lines 17-19).

Apart from her law practice, Kay otherwise lived a quiet life taking care of her family and her pets. (R. p. 480, line 5 – p. 481, line 16). In her later years, she developed a relationship with David Wallace (“David”). In 2001 or 2002 she did some legal work for him and for his company. (R. p. 494, lines 13-17). In 2002, David hired Kay as his secretary. (R. p. 499, lines 22-25; p. 500, line 1). As David’s secretary, Kay operated his office, paid his bills, kept his books and did his correspondence. (R. p. 494, lines 22-25; p. 500, line 1) (R. p. 511, lines 6-16). She did not perform any legal work for him or his business once she went to work for him as his secretary. (R. p. 500, lines 2-6).

Later, she and David developed a romantic relationship. At the time, Kay was living in a small house she owned in Lexington County. (R. p. 496, lines 9-19) (R. p. 497, line 25 – p. 498, line 5). Kay moved in with David in 2003 at his house in Forest Acres, South Carolina. (R. p. 498, lines 8-12). Kay and David lived there together until after his death in 2011 when she was evicted from their Forest Acres home by David’s children. (R. p. 498, lines 19-21).

Kay and David worked together in his yard creating a “showcase” home. (R. p. 511, lines 20-25) (R. p. 512, lines 1-2). They owned a number of pets together including cats and a pond full of Koi Fish. (R. p. 494, lines 18-25). (R. p. 495, line 1). (R. p. 495, lines

5-11). They took many vacations together. They maintained both separate and joint bank accounts. (R. p. 508, lines 6-11).

Kay and David considered themselves to be husband and wife, although they never formally married. (R. p. 486, lines 6-11). Ms. Paschal wore a ring given to her by David. She adopted his last name as her own. (R. p. 467, lines 23-25; p. 468, line 7). Many of their mutual friends believed them to be husband and wife. (R. p. 613, line 25 – p. 614, line 4). The jury heard testimony that on the Friday prior to David's stroke, he and Kay applied for a marriage license. (R. p. 513, lines 11-25). (R. p. 514, lines 1-4).

In April of 2010, David went to Providence Hospital for insertion of a stent in his carotid artery. (R. p. 512, lines 21-25) (R. p. 513, lines 1-10). It was anticipated that this would be a same day surgery or, at most, that David would only be hospitalized overnight. (R. p. 514, lines 5-7). No problems were anticipated or expected. (R. p. 514, lines 5-7). Unfortunately, shortly after the procedure, David suffered a debilitating stroke which left him paralyzed. (R. p. 515, lines 3-12) (R. p. 471, lines 20-25) (R. p. 472, lines 1-7). This complication resulted in a lengthy hospital stay, both at Providence Hospital and at HealthSouth Rehabilitation Hospital. (R. p. 515, line 16 – p. 516, line 5).

Sometime prior to the Providence/HealthSouth hospitalizations, David executed a Power of Attorney ("POA") giving Kay his Power of Attorney. (R. p. 500, lines 16-25) (R. p. 954). The POA was prepared in the office and given to David. He took the POA and had it executed outside of the presence of Kay and away from the office. (R. p. 501, lines 1-19). Although Sheriff Lott makes much of the preparation and execution of the POA in his Brief, the jury heard ample testimony and evidence that Kay had absolutely no involvement in its execution by David. (R. p. 506, lines 7-22). She testified that she did

not know where he had it executed or any of the witnesses to the execution of the agreement. (R. p. 501, lines 17-19).

David brought the executed POA back to the office and gave it to Kay who put it in a file. She did not file it with the Court. During David's hospital stay, she was instructed by David's medical care providers to file it. (R. p. 473, lines 20-25) (R. p. 474, lines 1-8). After filing the POA, Ms. Paschal signed David's name on checks as she had always done, even in front of David's two children. (R. p. 474, lines 1-5) (R. p. 507, lines 1-5) (R. p. 506, line 1). The Wallace children were well aware of the Power of Attorney and during their father's lifetime raised no issue with Kay using it. To the contrary, the Wallace children never challenged Kay's use of the Power of Attorney to care for their father at any time during his lifetime. (R. p. 525, lines 13-17).

David was discharged from the hospital with significant physical disabilities and limitations. As a result of the stroke he could not walk. (R. p. 471, line 20 – p. 472, line 22). He could not feed himself. He had issues with bowel control. (R. p. 517, lines 2-12). He was, however, able to understand and converse with others around him even though his speech was somewhat impaired. (R. p. 516, lines 6-24). Individuals who spoke to him were able to understand him and carry on a conversation with him. (R. p. 444, lines 5-14) (R. p. 471, line 20 – p. 472, line 7). Contrary to information given to the Lexington Magistrate by Appellant/Respondent, David was never declared mentally incompetent in any way prior to his death. (R. p. 192, lines 16-22) (R. p. 193, lines 18-23) (R. p. 194, line 1). He was never declared to be a vulnerable elderly adult. (R. p. 193, lines 12-17). No guardian was ever appointed for him during his lifetime. (R. p. 195, lines 3-5).

After the stroke, Kay was David's primary caregiver. While he was hospitalized she remained at the hospital with him. (R. p. 528, lines 1-5). Kay hired two caregivers to assist her with David's care during the day. (R. p. 517, lines 13-23). At night, Kay was his primary caregiver. She drove him to his rehabilitation/physical therapy/doctor's visits. She took him on outings. She prepared his meals. (R. p. 519, lines 7-12) (R. p. 518, lines 13-23). She changed David's dressings and gave him his medications. (R. p. 528, lines 1-18). She did all of the laundry. (R. p. 469, line 25 – p. 470, line 3). She purchased a queen sized hospital bed and slept with him at night in case he needed her. (R. p. 471, lines 7-19).

She also oversaw modifications to the house which included replacing carpet with linoleum (to make it easier for him to get around in a wheelchair), constructing an indoor ramp, and contacting an architect to make the bathrooms more accessible. She purchased a refrigerator for protein drinks for David. (R. p. 469, lines 15-25) (R. p. 470, lines 10-16). Kay purchased a Hoyer lift to assist in getting David in and out of bed. (R. p. 469, line 15 – p. 471, line 12).

One of Kay's many responsibilities was to drive David to and from his rehabilitation/doctor's appointments. She also drove him to dinner and on outings. (R. p. 518, lines 14-21). Because of his paralysis and size (compared to her own) she had difficulty getting him in and out of their vehicle in his wheelchair. (R. p. 518, line 22 – p. 519, line 2). She went to Carolina Mobility and spoke with Tim Petersen, the general manager, about purchasing a handicap accessible van for David. (R. p. 434, lines 10-12) (R. p. 442, lines 3-9). Mr. Petersen left the dealership with Kay and picked up David who was at a rehabilitation appointment. The three of them returned to Kay and David's

residence. (R. p. 442, line 21 – p. 443, line 2). Mr. Petersen assisted Kay in getting David out of the van and into the house.

Mr. Peterson spoke with David and Kay regarding their choice of handicap accessible vans. David was present and participated in the decision as to which van they preferred. Mr. Petersen was able to verbally communicate with David. (R. p. 443, lines 19-23). He was able to understand what David was saying to him. (R. p. 443, lines 19-23). David was able to communicate what he liked or disliked in a particular van. (R. p. 444, lines 19-23). (R. p. 444, lines 11-16). David and Kay decided to purchase a handicap accessible Toyota van. Kay consummated the transaction, which involved trading in a Cadillac, using her Power of Attorney. (R. p. 189, lines 11-22) (R. p. 436, lines 17-25). She used David's money to pay for the van. (R. p. 520, lines 6-25; p. 521, lines 1-3) (R. p. 523, lines 9-13) (R. p. 966) (R. p. 967) (R. p. 968). David was aware of this transaction and aware of the fact that his money and the Cadillac were being used to purchase the van. (R. p. 523, lines 11-13). (R. p. 447, lines 19-24). Kay testified that she would not have consummated the transaction if David had not wanted her to do so. (R. p. 523, lines 3-7).

All of the proceeds from the Cadillac were applied to the price of the van. Contrary to the representations of Appellant/Respondent, Kay did not realize any of the proceeds from the sale of the car. (R. p. 479, lines 5-22). Mr. Petersen, as was his customary practice, recommended that the van be titled as "Mr. Wallace or Ms. Paschal" to make transfer of the van easier for the "surviving party." (R. p. 435, lines 16-25) (R. p. 436, lines 1-8).

Kay used the van to transport David to his appointments and on outings. She only used the van without David to buy groceries. She did not use the van for any personal reasons or use. (R. p. 434, lines 1-12).

On February 20, 2011, David died leaving an estate of approximately 6 Million dollars. (R. p. 512, lines 17-22). At the time of his death, David had two adult children, a son, Jeffrey Wallace, and a daughter, Elizabeth Wallace. (R. p. 189, lines 1-10). The jury heard testimony that Elizabeth is a lawyer and Jeffrey at one time worked for the CIA. During David's lifetime, the children's contact with him was limited. The jury heard testimony that the children rarely visited David. The jury heard testimony that they did not participate in David's care, instead leaving it to Kay. (R. p. 519, lines 3-12). However, after his death they immediately instituted criminal proceedings against Kay alleging abuse and neglect. (R. p. 161, lines 11-22). They also initiated proceedings against Kay in the Richland County Probate Court, for the first time challenging the POA and Kay's use of it to care for their father. (R. p. 528, lines 23-25).

Leon Lott is the duly elected Sheriff of Richland County. He hired a deputy named Heidi Scott (now Heidi Scott Jackson) ("Lt. Jackson"). All of Lt. Jackson's actions were carried out in her capacity as a deputy for the Richland County Sheriff's Department. (R. p. 96, lines 3-5) (R. p. 97, lines 11-14) (R. p. 98, lines 7-18). The jury heard evidence that Lt. Jackson was never properly deputized. South Carolina Code Section 23-27-70 requires each deputy sheriff to post a surety bond prior to functioning as a deputy. South Carolina Code Section 23-11-30 also requires a bond on the part of the Sheriff. Neither Sheriff Lott nor Lt. Jackson had any such surety bond.

The Wallace children's criminal complaint against Kay ultimately found its way to Lt. Jackson. The jury heard evidence that Lt. Jackson had very little training as a law enforcement officer. She did have training and experience as a victim's advocate. (R. p. 107, lines 14-20). Lt. Jackson was assigned to the Wallace case. She became very close

to the Wallace children during the investigation. By her own admission, she worked closely with them. (R. p. 147, lines 16-20) (R. p. 148, line 3 – p. 151, line 7). As set forth below, the jury heard ample evidence that Lt. Jackson did everything in her power to provide the Wallace children an advantage in the Probate Court proceedings.

Lt. Jackson's first interaction with Kay occurred on March 8, 2011, less than three weeks after David's death. At that time, Kay was at the home she shared with David with his children explaining computer passwords and the property owned by David at the time of his death. (R. p. 529, lines 9-25 – p. 531, line 7). Lt. Jackson showed up with Richland County Sheriff's Department officers and a search warrant. This was a complete surprise to Kay, but not to the Wallace children. (R. p. 542, lines 13-18). The Wallace children appeared to Kay be very friendly with Lt. Jackson and the deputies. There appeared to Kay to be a "special relationship" between the Wallace children, Lt. Jackson and the Richland deputies. (R. p. 542, lines 3-18). The jury heard evidence that the Wallace children appeared to not only assist Lt. Jackson with her search, but to direct it. (R. p. 531, lines 8-16) (R. p. 531, line 25 – p. 532, line 16). On at least one occasion during the search, the children personally found items and handed them to Lt. Jackson. (R. p. 545, lines 1-7).

In addition, during the search, Lt. Jackson and her cohorts took computers, printers, cameras and photo cards. Many of the pictures seized during the search were pictures of Kay and David's pets and pictures that Kay had taken during her vacation trips with David. These belongings had great sentimental value to Kay. (R. p. 530, lines 11-24) (R. p. 545, lines 8-17). None of these seized items have ever been returned to her. (R. p. 545, lines 18-23).

As set forth above, Lt. Jackson was a Richland County deputy. She had absolutely no authority at all in Lexington County. (R. p. 101, lines 5-25) (R. p. 102, lines 21-25). Lt. Jackson testified that she is aware that she had no jurisdiction in Lexington County. (R. p. 101, line 10 – p. 103, line 21). She was never asked by anyone in Lexington County to participate in any ongoing Lexington County investigation. (R. p. 103, lines 22-25).

Notwithstanding this fact, Lt. Jackson arranged for a second search of Kay's former residence on Kitty Hawk Drive in Lexington County on May 8, 2011. (R. p. 117, line 18 – p. 120, line 21). (R. p. 969). The search warrants are directed to "any bonded law enforcement officer of the aforementioned county." (R. p. 119, lines 17-25). (R. p. 969). As set forth above, Lt. Jackson was not a bonded law enforcement officer and she was not an officer of Lexington County. (R. p. 120, lines 5-15) (R. p. 139, lines 20-22). Despite this obvious deficiency, Lt. Jackson conducted the search and seized Kay's property located in Lexington County anyway.

This search occurred immediately after Kay had been evicted from the Forest Acres home in the Probate Court proceeding initiated by the Wallace children. (R. p. 548, line 2 – p. 549, line 6). Kay was in the process of trying to convert her former Lexington County residence, which had been used for storage during the years she lived with David, back into a habitable residence when Lt. Jackson and Richland County Sheriff's Department officers arrived at her house. Like the first search, this second search was done on the authority and direction of Lt. Jackson and carried out solely by Richland County Sheriff's Department officers. (R. pp. 118-119) (R. p. 138, lines 12-16) (R. p. 555, lines 9-16). Like the first search, the Wallace children, Kay's adversaries in the Probate Court proceeding, were present when this search occurred. (R. p. 549, lines 7-24). Once again

this search (which was very surprising to Kay) did not appear to be a surprise to the Wallace children. (R. p. 549, lines 15-17). Once again they participated in the search and assisted Lt. Jackson and her cohorts in it. (R. p. 550, line 21 – p. 551, line 3) (R. p. 551, lines 12-24). Kay testified that during the search Lt. Jackson laughed and joked with Elizabeth Wallace. (R. p. 551, line 23) (R. p. 552, line 18 – p. 553, line 12).

As she had done during the earlier search in Richland County, Lt. Jackson took computers and cameras containing items of great sentimental value to Kay including family photographs, not just of David, but also of her own family. The items seized from Kay's Lexington County home were taken to the Richland County evidence room by Lt. Jackson. (R. p. 173, lines 3-4). None of these items were ever returned to Kay. (R. p. 555, line 23 – p. 556, line 23). Kay has never received any explanation from the Sheriff's Department as to why they will not return what has been seized. These items have been in the possession of the Sheriff's Department for years with no explanation or excuse. (R. p. 578, lines 15-21).

The jury heard evidence that these searches were done close to Probate Court hearings. The jury heard ample evidence so that it could have concluded that the two searches were done in a way which deprived Plaintiff of relevant evidence to present to the Probate Court (R. p. 545, line 21 – p. 546, line 3) (R. p. 546, line 19 – R. p. 547, line 2). The jury heard testimony regarding the impact of the illegal search and seizure and the fact that it (along with the Richland County search) resulted in the Plaintiff being unable to properly present evidence to the Probate Court. (R. p. 546, line 19 – p. 547, line 2). Kay did not have access to her evidence and she did not have access to her records.

Lt. Jackson's improper involvement in this case did not end with the illegal search. On November 16, 2011, a hearing to remove Kay as the administrator and trustee of David Wallace's estate was scheduled in the Richland County Probate Court. (R. p. 559, lines 5-23) (R. p. 968). After the illegal search and seizure, Lt. Jackson, with the knowledge, permission and ratification of Sheriff Lott, participated in the preparation of two arrest warrants in Lexington County for Kay's arrest. (R. p. 104, line 21 – p. 105, line 6). The charges had previously been investigated in Lexington County by Lexington County authorities. (R. p. 203, lines 6-23). Steve Baumgartner, an 18 year employee of the Lexington County Sheriff's Department, thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Kay with any wrongdoing or to arrest her. (R. p. 206, line 18 – p. 207, line 7) (R. p. 218, line 8 – p. 221, line 11) (R. p. 360, line 23 – p. 361, line 10) (R. p. 365) (R. p. 979). Despite this finding by the investigating authorities in Lexington County Law Enforcement, Lt. Jackson continued her crusade against Kay.

The two warrants were sworn to by Lt. Jackson. (R. pp. 977-978) (R. p. 104, lines 21-23). Lt. Jackson personally travelled to Lexington County to obtain these warrants. The jury heard testimony that this was the first time she had ever done this in her career. (R. p. 227, line 25 – p. 228, line 2). They were issued solely on information supplied to the issuing Judge (Judge Whittle) by Lt. Jackson. (R. p. 105, lines 1-10). The jury heard evidence that Lt. Jackson did not know the meaning of foundational words that she used in the affidavit to obtain the arrest warrant. (R. p. 1) (R. p. 225, lines 11-24). The jury heard testimony that Lt. Jackson did not have any evidence that Kay intentionally or willfully used a fraudulent POA. (R. p. 240, line 12 – p. 241, line 13). The jury heard testimony

from which it could have inferred that Lt. Jackson was less than candid or truthful in swearing out the warrants before Judge Whittle. These warrants resulted in Kay turning herself in and being arrested. There was no proof Kay did anything wrong and the jury heard testimony that Lt. Jackson withheld information from the Lexington County Magistrate when she got the warrants. (R. p. 1). She did not tell the Lexington County Magistrate that Lexington County had already investigated these charges and found no probable cause. (R. p. 1). In securing the warrants, Lt. Jackson did not tell the Magistrate that she had spoken with Dayton Riddle, a solicitor in Lexington County, who had raised concerns about Lt. Jackson swearing out a warrant in Lexington County. (R. p. 1.).

As a result of the arrest warrants, Lt. Jackson called Kay on November 15th, the day before a scheduled Probate Court hearing, and informed her of the outstanding warrants and that she needed to go to the Lexington County jail the next morning at 5:30 AM. (R. p. 559, line 5 – p. 561, line 2) (R. p. 975). Kay went to the jail at the direction of Lt. Jackson at 5:30 AM on the following day (November 16th) and was arrested. As a result of her arrest and incarceration, she was not able to attend the Probate Court hearing. (R. p. 561, line 25 – p. 561, line 16). The matter was heard in Probate Court in Kay's absence. (R. p. 564, lines 15-19).

The jury heard ample evidence of the degradation that Kay, a member of the South Carolina Bar and an officer of the South Carolina Courts, experienced during her 40 hours in the Lexington County Jail. (R. p. 564, line 19). Kay was booked, photographed and fingerprinted. (R. p. 562, line 25 – page 563, line 5). Her bond was set for \$50,000, in part due to testimony from Elizabeth Wallace. (R. p. 564, lines 4-14). Kay did not have the money to post bail. (R. p. 564, lines 13-17). She was initially given a jumpsuit to wear,

but due to the fact it needed to be washed, she had to turn it in after the bond hearing and was given a sheet to wear. (R. p. 563, lines 6-19). She was forced to spend the night in jail with only a sheet (no bra or panties), sleeping on a mat on the floor with other prisoners. (R. p. 565, line 4 – p. 567, line 9). The jury heard ample evidence of the fear, anxiety, humiliation and shock that this caused Kay. (R. p. 565, line 4 – p. 567, line 9).

A bond modification hearing was held on November 17, 2011, before the Honorable Knox McMahon, Presiding Judge of Lexington County. (R. p. 569, line 3 – p. 571, line 8) (R. p. 974). To get to the hearing, Kay had to walk through the Courthouse in a prison jumpsuit. She suffered the humiliation of seeing faces she had worked with during her long years as a practicing attorney in Lexington County. The jury heard testimony that neither Lt. Jackson nor any of the Wallace children were present at the bond modification hearing. Judge McMahon's Order granting Kay's motion to modify her bond expressed concerns about the fact that Kay had been arrested in Lexington County on arrest warrants signed by a Richland County Deputy "apparently functioning in Lexington County." His Order raised questions as to the legality of the warrants. (R. p. 570, lines 2-8). Judge McMahon ordered Kay's release on a \$1,000.00 personal recognizance bond on each count. (R. p. 570, lines 22-25) (R. p. 974).

The charges brought against Kay by Lt. Jackson were ultimately dismissed for lack of probable cause in January of 2012. (R. p. 175, lines 19-24). (R. p. 576, lines 16-21) (R. p. 571, lines 7-23). Based on the lack of evidence and the lack of jurisdiction, the Honorable Gary Morgan, Magistrate for Lexington County, dismissed the criminal warrants in Lexington County. (R. p. 115, lines 7-10) (R. p. 381, lines 1-2) (R. p. 383, lines 1-3).

Sadly, the dismissal of the Lexington County charges for lack of probable cause did not bring this matter to an end. In December 2013, after Kay commenced this action, two additional warrants for "forgery, no dollar amount" were sworn out by the Richland County Sheriff's Department. (R. p. 176, lines 21-25) (R. p. 177, lines 1-11) (R. p. 579, line 15 – p. 581, line 24) (R. pp. 1016-1017). Howard Hughes, an employee of the Sheriff's Department, prepared these affidavits "upon information and belief." (R. pp. 1016-1017). There are no factual averments in the compliant, nor is there any indication that Mr. Howard Hughes had any firsthand knowledge of any of the claimed allegations against Kay. Kay has never been given any information as to what these charges are or what they involve. Her efforts to get a preliminary hearing as to these charges have been unsuccessful. (R. p. 581, lines 8-19). These cases have languished for over two years.

As a result of the arrest warrants sworn out by Lt. Jackson, Kay had to report her arrest to the South Carolina Supreme Court. Her license to practice law was suspended and has remained suspended since that date. (R. p. 475, lines 12-25) (R. p. 479, lines 7-10) (R. p. 987). The jury heard evidence of the damages suffered by Kay as a result of her arrest including embarrassment, humiliation, and loss of income. (R. p. 1).

STANDARD OF REVIEW

In ruling on motions for a directed verdict or JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d

881, 888 (Ct.App.2002) (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* The Appellate Court will reverse the trial court's ruling on a directed verdict or JNOV motion only where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

ARGUMENT

I. THE TRIAL COURT'S USE OF 22-5-110 WAS PROPER AND DID NOT RESULT IN APPELLANT/RESPONDENT RECEIVING AN UNFAIR TRIAL

Appellant/Respondent Sheriff Lott first takes issue with the Trial Court's use of South Carolina Code Section 22-5-110 to evaluate the actions of Lt. Jackson with respect to her appearance before the Lexington Magistrate, Judge Whittle, and the arrest warrants that she obtained in Lexington County. Appellant/Respondent Sheriff Lott asserts that the Trial Court's use of this statute at trial resulted in denial of Appellant/Respondent Sheriff Lott's directed verdict motions, as well as his post-trial JNOV Motions. Appellant/Respondent Sheriff Lott finally asserts that this resulted in him receiving an unfair trial. This assertion lacks merit.

Although this Statute came up on multiple occasions during the Trial, it was not, contrary to the arguments of Appellant/Respondent, "the centerpiece or focus of her (Respondent/Appellant Paschal's) case." (Brief of Appellant, page 11). Rather, reference to this statute was only one instance or example of Lt. Jackson's improper conduct and

activities in Lexington County and interaction with the Lexington County Magistrate that were presented to the jury. Further, the Court's use of 22-5-110 by the Trial Court was proper and did not constitute an error of law. As correctly recognized by the Trial Court, the Appellant/Respondent's conduct with respect to this statute was only one example of the "...overzealous, ill-willed, and improper prosecution...conducted by the Defendant (Appellant/Respondent) with respect to the Lexington County charges." (R. p. 6).

In evaluating and ultimately denying the Respondent's Post-Trial Motions, Judge Keesley recognized that "...whether the court applied the law properly...has been the cause of some angst in evaluating the post-trial motions." (R. p. 7). Judge Keesley recognized that, "some of this relates to the proper interpretation of S.C. Code Ann. 22-5-110 and its applicability to the actions of the Defendant's Deputy." (R. p. 7). The Court rejected Respondent's argument that this statute had no applicability to the actions of Lt. Jackson, concluding:

Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct of the Defendant (Respondent) in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann 22-5-110, that the Defendant (Respondent) was put on notice by the 11th Circuit Solicitor's office of the applicability of that statute, that there was mention to the Richland County Lieutenant about Magistrates having to issue a courtesy summons in some situations, that the Richland County failed to alert the Magistrate about the information she obtained related to a courtesy summons, and that she withheld from the Magistrate the fact that the Lexington County Sheriff's Office investigation did not conclude that charges were warranted.

The Trial Court's analysis and conclusions were correct and supported by the evidence presented at Trial. The jury heard ample evidence of Lt. Jackson's participation in the preparation and procurement of two arrest warrants in Lexington County for Kay's arrest. (R. p. 104, line 21 – p. 105, line 6). These were done in the course and scope of her

employment by the Richland County Sheriff's Department. These charges had previously been investigated in Lexington County by Lexington County authorities. (R. p. 203, lines 6-23). Steve Baumgartner, an 18 year employee of the Lexington County Sheriff's Department, had thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Kay with any wrongdoing or to arrest her. (R. p. 206, line 18 – p. 207, line 7) (R. p. 218, line 8 – p. 221, line 11) (R. p. 360, line 23 – p. 361, line 10) (R. p. 365) (R. p. 979).

The two warrants were sworn to by Lt. Jackson. (R. pp. 978-979) (R. p. 104, lines 21-23). They were issued solely on information supplied to the issuing Judge (Judge Whittle) by Lt. Jackson. (R. p. 105, lines 1-10). The jury heard evidence that Lt. Jackson did not know the meaning of foundational words that she used in the affidavit to obtain the arrest warrant. (R. p. 1). These warrants resulted in Kay turning herself in and being arrested. There was no proof Kay did anything wrong and the jury heard testimony that Lt. Jackson withheld information from the Lexington County Magistrate when she got the warrant (R. p. 1). She did not tell the Lexington County Magistrate that Lexington County had already investigated these charges and found no probable cause (R. p. 1). In securing the warrants, Lt. Jackson did tell the Magistrate that she had spoken with Dayton Riddle, the assistant solicitor in Lexington County who had raised concerns about Lt. Jackson swearing out a warrant in Lexington County (R. p. 267, lines 4-20) (R. p. 268, lines 1-20) (R. p. 831, lines 17-21) (R. p. 832, lines 1-18). (R. p. 1). As correctly recognized by Judge Keesley in his Order, Solicitor Riddle pointed out the statute and its possible application to Lt. Jackson obtaining warrants to arrest Kay. However, at no time did Lt. Jackson convey

these concerns to the Magistrate in her haste to obtain arrest warrants against Kay. (R. p. 267, lines 4-20).

The Appellant/Respondent argues that the Trial Court's alleged misinterpretation and misapplication of this code section resulted in the denial of a directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial. This argument is not supported by the facts that were presented to the jury. As set forth by Judge Keesley on numerous occasions during Trial and in his Order, the jury heard ample evidence to support Respondent/Appellant's causes of action. (R. p. 1). There is simply nothing to support the Appellant/Respondent's assertions that the Trial Court's handling of this statute resulted in either the denial of Appellant/Respondent's directed verdict or JNOV motions or resulted in an unfair trial. This argument should be rejected by this Court.

II. THERE WAS AMPLE EVIDENCE TO SUPPORT RESPONDENT/APPELLANT'S MALICIOUS PROSECUTION CLAIM

Appellant/Respondent Sheriff Lott argues that the Trial Court erred in denying his Motions for Directed Verdict/JNOV with respect to Respondent/Appellant's cause of action for malicious prosecution. To recover in a malicious prosecution action, a plaintiff must prove the following: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in the plaintiffs favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Brovhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867, 870-71 (Ct.App.2012) The Respondent/Appellant asserts that there was ample evidence in this case to support her claim for Malicious Prosecution. (R. p. 1).

Appellant/Respondent Sheriff Lott focuses his argument by alleging that Respondent/Appellant failed to prove two essential elements of her malicious prosecution cause of action, probable cause and termination of the underlying proceedings in her favor. See, *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867 (Ct. App. 2012).

Contrary to the assertions and arguments of Appellant/Respondent Sheriff Lott, the jury heard ample evidence as to both of these elements and the Trial Court correctly denied Appellant/Respondent Sheriff Lott's directed verdict and post-trial motions with respect to this cause of action.

The jury heard ample evidence from which it could have concluded that facts within the knowledge of Lt. Jackson would have lead a reasonable person to believe the individual arrested was not guilty of a crime. *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d. 656 (Ct. App. 2005). The jury heard conflicting testimony as to Lt. Jackson's investigation, or lack thereof prior to obtaining her arrest warrants. The jury heard conflicting testimony regarding Lt. Jackson's contact with Tim Peterson, the employee with Carolina Mobility who handled the sale of the van. The jury heard evidence as to her "version" of sale of the van. The jury also heard testimony and evidence regarding the Lexington County Sheriff's Department's own investigation of the same transaction. The jury heard testimony that these same charges had previously been investigated in Lexington County by Lexington County authorities. (R. p. 203, lines 6-23). Steve Baumgartner, an 18 year employee of the Lexington County Sherriff's Department, had thoroughly investigated the matter involving the use of the POA to purchase the handicap accessible van and determined that there was no probable cause to charge Kay with any wrongdoing or to arrest her. (R. p.

206, line 18 – p. 207, line 7) (R. p. 218, line 8 – p. 221, line 11) (R. p. 360, line 23 – p. 361, line 10) (R. p. 365) (R. p. 979).

As he did in his post-trial motions, Appellant/Respondent Lott relies upon Lt. Jackson's conversations with various law enforcement personnel as justification of her actions with respect to the arrest warrants. However, as brought out by Ms. Paschal's counsel in his cross examination of these witnesses, these contacts were fatally flawed in that Lt. Jackson did not present any of these individuals with a full set of facts prior to eliciting their opinions and were therefore designed to bolster her own flawed prosecution of the case, as opposed to obtaining objective opinions regarding the status of her investigation. (R. p. 260, line 2 – p. 261, line 16). The Trial Court properly considered this argument and rejected it, recognizing, "there is a dispute as to whether there was a full and complete disclosure of all the material facts, and whether Defendant acted and relied upon such advice in good faith before seeking the arrest warrants in Lexington County." (R. p. 1).

Unlike the *Jackson* case, relied upon by Appellant/Respondent Lott, the facts of this case with respect to probable cause certainly do not yield "but one conclusion" making this issue a question of law and not fact. Whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion. *Law v. South Carolina Department of Corrections*, 368 S.C. at 436, 629 S.E.2d 642 (2006) (citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 323, 143 S.E.2d 607, 609 (1965)). This is certainly not an instance where the evidence presented regarding probable cause yields only one conclusion. The Trial Court properly submitted the question of

probable cause to the jury and did not err in denying Appellant/Respondent Lott's post-trial motions with respect to this issue.

Appellant/Respondent Sheriff Lott next argues that Kay failed to present evidence from which a jury could have determined that the judicial proceedings (in this case the arrest warrants and subsequent criminal charges terminated in her favor. See, *McKenney v. Jack Eckerd Company*, 304 S.C. 21, 402 S.E.2d 887 (1991). However, as recognized by Judge Keesley, there was ample evidence presented for the jury to conclude that the proceedings terminated in Kay's favor. The jury heard ample evidence that the charges brought against Kay by Lt. Jackson were ultimately dismissed for lack of probable cause in January of 2012. (R. p. 175, lines 19-24). (R. p. 576, lines 16-21) (R. p. 579, lines 7-23) (R. p. 835, lines 20-24) (R. p. 836, lines 3-10). Based on the lack of evidence and the lack of jurisdiction, the Honorable Gary Morgan, Magistrate for Lexington County, dismissed the criminal warrants in Lexington County. (R. p. 115, lines 7-10) (R. p. 381, lines 1-2) (R. p. 383, lines 1-3).

In denying Appellant/Respondent Lott's post-trial motions, the Court disagreed with Sheriff Lott's argument "...that there is a lack of evidence that the Richland County Sheriff's Department acted with malice in instituting or continuing the proceedings, and a lack of evidence about the Defendant instituting or continuing an action that lacked probable cause." (R. p. 1). To the contrary, the Court concluded that, ".....there is sufficient evidence to allow the jury to draw those conclusions." (R. p. 1). The Court's Order is supported by the evidence presented to the jury in this case and should be affirmed by this Court.

III. THERE IS AMPLE EVIDENCE TO SUPPORT RESPONDENT/APPELLANT'S ABUSE OF PROCESS CLAIM

Finally, Appellant/Respondent Sheriff Lott argues that the Trial Court erred in denying his directed verdict and post-trial motions relating to Kay's abuse of process claim. The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 74 n. 5, 567 S.E.2d 251, 255 n. 5 (Ct. App. 2002). To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. With respect to the cause of action for abuse of process, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967).

As recognized by the Trial Court, the jury heard ample evidence from which it could have concluded that Lt. Jackson completely perverted the legal process in this case, resulting in humiliation, embarrassment and damages to Kay. The jury heard evidence that the Appellant/Respondent's officers, particularly Lt. Jackson, single-mindedly and doggedly pursued its investigation oblivious to the actual facts of this case. The jury heard ample testimony that this was done, in part, to assist the Wallace children in pursuing a vendetta (both in and out of Probate Court) against Respondent/Appellant. As the jury correctly determined, the Defendant knew very well the potential consequences of her actions and proceeded without just cause despite the consequences. The Trial Court correctly determined and ruled that the jury heard ample testimony on which it could have

returned a verdict for abuse of process under South Carolina Law. The Trial Court's Order should be affirmed by this Court.

CONCLUSION

For the reasons set forth, the Trial Court correctly denied Appellant/Respondent Sheriff Lott's directed verdict motions and post-trial motions with respect to South Carolina Code Section 22-5-110, Malicious Prosecution and Abuse of Process. (R. p. 1). The Trial Court's Order should be affirmed by this Court with respect to the issues raised by Appellant/Respondent in his brief.

By: _____


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July 18, 2016

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Common Pleas Court

William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001153

Kay F. Paschal..... Respondent/Appellant,

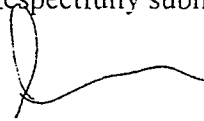
v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent/Appellant certifies that Respondent/Appellant
Kay F. Paschal's Final Brief of Respondent complies with Rule 211(b) SCACR.

Respectfully submitted,



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July 19, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Common Pleas Court

William P. Keesley, Circuit Court Judge

Appellate Case No. 2015-001153

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JUL 19 2016
SC Court of Appeals

Kay F. Paschal..... Respondent/Appellant,

v.

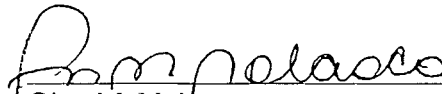
Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina Appellant/Respondent.

PROOF OF SERVICE

I, Gina M. Nolasco, an employee of the Moore Taylor Law Firm, P.A., certify that I have served Respondent/Appellant Kay F. Paschal's Final Brief of Appellant and Respondent/Appellant Kay F. Paschal's Final Brief of Respondent by United States mail, in an envelope with sufficient postage affixed there to, upon all counsel of record on July 19, 2016.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Case No. 2012-CP-32-0342

RECEIVED

JUL 22 2016

SC Court of Appeals

Kay F. Paschal, ... Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Appellant/Respondent.

**RESPONDENT'S BRIEF
OF APPELLANT-RESPONDENT**

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STATEMENT OF THE CASE

This appeal involves a malicious prosecution and abuse of process action brought by the Respondent-Appellant Kay F. Paschal against the Appellant-Respondent Leon Lott in his official capacity as Sheriff of Richland County. In her complaint, Paschal asserted causes of action for false arrest, malicious prosecution, abuse of process, negligence and civil conspiracy. Prior to trial, the Defendants Heidi Scott,¹ Elizabeth Wallace and Jeffrey Wallace were dismissed. In addition, the civil conspiracy claim was dismissed.

The causes of action proceeded to trial on July 21, 2014, before Circuit Judge William P. Keesley and a jury. At the close of Paschal's case and again at the close of the evidence, Sheriff Lott moved for a directed verdict on multiple grounds. Judge Keesley granted a directed verdict on the false arrest claim, and Paschal withdrew the negligence claim. (R. 870). The malicious prosecution and abuse of process claims were submitted to the jury, which returned a verdict in favor of Kay Paschal on both claims. The jury also awarded actual damages of \$1.61 million. (R. 14).

After the verdict was returned, Sheriff Lott filed a motion for a judgment notwithstanding the verdict (JNOV). In the alternative, Sheriff Lott also moved for a

¹ Lt. Heidi Scott is now known as Heidi Jackson. She has been referred to by both names in the record including the trial transcript. For ease of discussion, she is being referred to as Heidi Scott in the briefs filed by Sheriff Lott in this appeal.

new trial absolute and a new trial nisi remittitur. Judge Keesley denied each of those motions. (R. 1-11). He did, however, reduce the verdict to \$300,000 consistent with the monetary caps under the South Carolina Tort Claims Act. (R. 11).

Kay Paschal filed a Rule 59(e) motion which was denied by Judge Keesley by order filed April 30, 2015. (R. 12-13).

Sheriff Lott thereupon filed a timely appeal to this Court. Paschal also filed a cross-appeal.²

² In her brief, Paschal includes a detailed "statement of facts" which is not pertinent to the purely legal issues raised by Paschal on cross-appeal. Sheriff Lott, therefore, is not responding to that "statement of facts" in this brief but relies on the factual discussion contained in the briefs filed with respect to his appeal.

ARGUMENTS

I. The trial court ruled correctly in applying the monetary caps pursuant to the South Carolina Tort Claims Act and reducing the verdict to \$300,000.

The Respondent-Appellant Kay Paschal contends on appeal that Circuit Court Judge William Keesley erred in reducing the verdict to the statutory cap of \$300,000 pursuant to Section 15-78-120(a)(1) of the South Carolina Tort Claims Act. Paschal argues that the statutory caps under the Tort Claims Act are applicable only to negligence claims and not to any other types of tort actions against governmental entities. In effect, Paschal claims that the General Assembly did not intend to place any monetary cap on liability for non-negligence claims against governmental entities. Judge Keesley ruled correctly in rejecting Paschal's novel and unsubstantiated argument.

The statutory caps are codified at Section 15-78-120 of the Tort Claims Act, which provides in pertinent part as follows:

- (a) For any action or claim for damages brought under the provisions of this chapter, the liability shall not exceed the following limits:
 - (1) Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.

See, S.C. Code Ann. § 15-78-120(a)(1). Paschal bases her argument on the definition

of "occurrence" which is defined in the Tort Claims Act as "an unfolding sequence of events which proximately flow from a single act of negligence." *See*, S.C. Code Ann. § 15-78-30(g). Thus, Paschal equates an "occurrence" with a "single act of negligence," and based thereon, she claims that the monetary caps only apply to negligence claims. She, in fact, insists that the General Assembly never intended the caps to apply to intentional torts, such as the abuse of process and malicious prosecution claims litigated in the present case.

Paschal, however, fails to cite to any legislative history or other authority to demonstrate that the General Assembly's intent was to subject governmental entities to unlimited liability for intentional torts or that the intent was to apply the monetary caps to negligence claims alone. The legislative history, the language in the Tort Claims Act itself, and existing precedent do not support Paschal's position.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Sumter Police Department v. Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894, 896 (Ct. App. 1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Id.* "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills. Inc. v. South Carolina Department of Revenue*, 331 S.C. 611,

620, 503 S.E.2d 471, 476 (1998).

In addition, it is well settled that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See*, S.C. Code Ann. § 15-78-20(f) (Supp. 1997). *See also*, *Baker v. Sanders*, 301 S.C. 170, 392 S.E.2d 229 (1990); *Strother v. Lexington County Recreation Commission*, 332 S.C. 54, 504 S.E.2d 117 (1998). In 1997, the General Assembly even added Section 15-78-200 to the Tort Claims Act, which reiterated that "[t]he provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and *must be liberally construed in favor of limiting the liability of the governmental entity*." *See*, S.C. Code Ann. § 15-78-200. (Emphasis added). The title to the 1997 legislation, in fact, requires any "ambiguity to be resolved as a matter of law in favor of the government." 1997 Act No. 155, Part II, Section 55.

The original legislative intent for the Tort Claims Act from 1986, as set out in Section 15-78-20(a), states that "neither should the government be subject to unlimited nor unqualified liability for its actions." *See*, S.C. Code Ann. § 15-78-20(a). Thus, from the outset, the General Assembly intended for there to be limited liability for *all* tort claims, as opposed to just negligence claims, as Paschal argues. That was reiterated in 1997, when the General Assembly reenacted the monetary caps. At that time, the General Assembly included the following legislative finding: "because of the unique nature, role, funding, and function of government, the General Assembly has never intended that the government or

taxpayers would be subject to *unlimited liability for tort actions* against the government." *See*, 1997 Act No. 155, Part II, Section 55. (Emphasis added). Again, the General Assembly focused on all tort claims and not just negligence claims.

Finally, two additional provisions in the Tort Claims Act also support the lower court's ruling. Section 15-78-120(a) starts by stating "*For any action or claim for damages* brought under the provisions of this chapter, the liability shall not exceed the following limits:" *See*, S.C. Code Ann. § 15-78-120(a). (Emphasis added). The key phrase is "any action or claim for damages." This indicates that the monetary caps were intended to apply to any and all tort claims -- not just negligence claims. If the intent were to apply the caps to just negligence claims, as Paschal claims, the General Assembly would not have used the language "any action or claim for damages brought under the provisions of this chapter" in the introductory clause for the caps provision of the Act. Similarly, Section 15-78-140(c) states: "For any claim filed under this chapter, the remedy provided in § 15-78-120 is exclusive." *See*, S.C. Code Ann. § 15-78-140(c). Again, the General Assembly used the term "any claim" and did not limit the exclusive remedy of Section 15-78-120 to "any negligence claim."³

³ The term "claim" is a defined term and means "any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, *caused by the tort* of any employee of the State or a political subdivision while acting within the scope of

Existing case law addressing Section 15-78-120 and the monetary caps also supports the lower court's decision. In *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564 (1990), the Supreme Court rejected an equal protection challenge to the Tort Claims Act caps. The Supreme Court held as follows:

[W]e find that the limitation on damages as set forth in the statute bears a reasonable relationship to the legislative objectives as expressed in Section 15-78-20(a) of relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government. The limitations set forth in the statute rest on a reasonable basis and are not arbitrary in that the legislature has balanced the needs for services and demand for reasonable taxes against the fair reimbursement of injured tort victims.

Finally, we find that the damage limitation provisions apply to similar plaintiffs in a similar manner. All tort victims injured by the State have a right to bring an action against it. ... [W]e find that potential plaintiffs are not treated disparately because the same monetary cap applies equally to the entire class of plaintiffs.

391 S.E.2d at 570. Thus, the Supreme Court spoke of "all tort victims" being treated the same by the monetary caps on liability. The Court did not differentiate between victims of negligence vis-a-vis victims of intentional torts or other non-

his official duty." See, S.C. Code Ann. § 15-78-30(b). (Emphasis added). The General Assembly used the term "tort" rather than the term "negligence."

negligence based torts. The Court further addressed the legislative intent to relieve governmental entities from "unlimited and unqualified liability."

These principles were reiterated by the Supreme Court in 2008, when in the case of *Giannini v. South Carolina Department of Transportation*, 378 S.C. 573, 664 S.E.2d 450 (2008), the Court again rejected an equal protection challenge to the monetary caps. In that case, the plaintiffs challenged the constitutionality of the aggregate cap set forth in Section 15-78-120(a)(2). As the Supreme Court explained, the plaintiff claimed that a class consisting of "tort victims injured by the state are not treated the same under the statute because the dollar amount may vary and be limited by the amount of persons injured in an occurrence." 664 S.E.2d at 456. The Court disagreed and found "the limitation accords with the stated legislative purpose of preserving finite government assets and treats similar plaintiffs in a similar manner." *Id.*

In sum, Paschal suggests that the General Assembly intended to treat victims of negligence differently from victims of non-negligence torts. However, that distinction appears nowhere in the Tort Claims Act, the legislative history, the existing case law nor the rules of statutory interpretation that require the Act to be liberally construed in favor of limiting governmental liability. Paschal makes this claim only by interpolating a flawed definition of "occurrence" into the monetary cap provision to suggest that a distinction was intended between negligence claims

and other tort claims.⁴ That is not the case. The General Assembly clearly intended for monetary caps to apply to all torts claims that may be brought pursuant to the Tort Claims Act, as is demonstrated in the legislative findings from 1986 and 1997, as well as in the introductory language to Section 15-78-120(a), which makes the caps applicable to "any action or claim for damages brought under the provisions of this chapter." *See*, S.C. Code Ann. § 15-78-120(a). For these reasons; in the event this Court reaches the issues raised on cross-appeal, the Court is requested to affirm the trial court's reduction of the verdict to \$300,000.

II. The trial court ruled correctly that the jury's verdict on two causes of action did not entitle Kay Paschal to a \$600,000 monetary cap.

As an alternative position, Kay Paschal further argues that, even if the monetary caps apply to this case, Judge Keesley erred in reducing the verdict to \$300,000 rather than \$600,000 because the jury returned a verdict for Paschal on two causes of action. Paschal cites to Section 15-78-120(a)(2) which provides for an aggregate cap of \$600,000 per single occurrence. However, she fails to recognize that Section 15-78-120(a)(1) applies a "per person" cap of \$300,000. Because Paschal is one person and has claimed that her loss arises from a single occurrence, then the applicable cap is \$300,000.

⁴ In reality, the reference to "single act of negligence" in the definition of "occurrence" should be properly read as "single tortious act."

Paschal does not appear to be arguing that there were two occurrences so as to justify a verdict of \$600,000. However, even if that were her argument, that position fails. In *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Supreme Court explained that the plaintiff has the burden of proving multiple occurrences. The Court pointed out that "the jury was never instructed on the definition of occurrence nor was it asked to determine whether there was more than one occurrence, either in the instructions or in its verdict." 694 S.E.2d at 174. The Court thus concluded that the trial judge correctly reduced the verdict to \$300,000 so as "to reflect a single occurrence." *Id.*

The same is true in the present case. Here, Paschal never presented proof of multiple occurrences. The jury was never instructed on the definition of occurrence nor asked to determine whether there was more than one occurrence. Moreover, as Judge Keesley explains in his order, Paschal's counsel at trial admitted the causes of action were the same or at least intertwined and that the damages would be the same under either theory of recovery. (R. 4). In fact, in a colloquy regarding the verdict form, Judge Keesley described the damages as "overlapping" and asked for Paschal's counsel to comment, to which the following was stated:

Mr. Moore: I don't think we've got two different causes of action. The evidence would appear to be the same and the abuse of process they are claiming is a criminal investigation. If they award for malicious prosecution, that – they would be the same thing.

The Court: All right, so you want me to have one verdict form, and if they find for the Plaintiff on either or both then they fill in the part about damages?

Mr. Moore: I think that would be appropriate.

(R. 913-14).

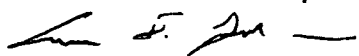
In sum, Paschal has not demonstrated that the jury's finding in her favor on two causes of action entitles her to a \$600,000 verdict. Section 15-78-120(a)(1) provides for a "per person" cap of \$300,000 for a loss arising from a single occurrence. Paschal has not demonstrated nor did the jury find that her loss arose from more than one occurrence. Her counsel, in fact, conceded that the causes of action were the same and gave rise to the same damages. Judge Keesley, therefore, ruled correctly in reducing the verdict to \$300,000.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Leon Lott respectfully requests that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute. However, should the Court reach the cross-claim brought by the Respondent-Appellant, the Court is asked to affirm the reduction of the verdict to \$300,000.

Respectfully submitted,

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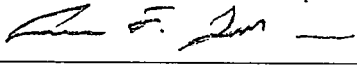
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JUL 22 2016

SC Court of Appeals

The undersigned counsel for the Appellant-Respondent Leon Lott certifies
that the Final Respondent's Brief of Appellant-Respondent complies with Rule
211(b), SCACR.

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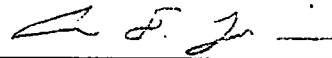
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The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Respondent's Brief of Appellant-Respondent complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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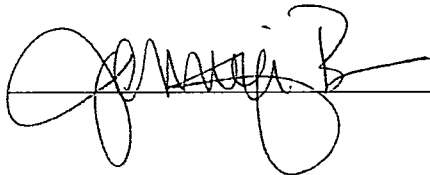
JUL 22 2016

SC Court of Appeals

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent, Leon Lott, does hereby certify that service of **Respondent's Brief of Appellant-Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of July 2016:

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THE STATE OF SOUTH CAROLINA
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JUL 22 2016

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
William P. Keesley, Circuit Court Judge

Case No. 2012-CP-32-0342

Kay F. Paschal, ... Respondent/Appellant,

v.

Leon Lott, the Duly Elected Sheriff of
Richland County, South Carolina, ... Appellant/Respondent.

**REPLY BRIEF
OF APPELLANT-RESPONDENT**

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ARGUMENTS

I. The trial court erred in its interpretation and application of Section 22-5-110, which resulted in the denial of directed verdict and JNOV motions and also caused Sheriff Lott to receive an unfair trial.

The Appellant-Respondent Leon Lott ("Sheriff Lott") contends that Circuit Court Judge William P. Keesley committed reversible error in how he handled the legal issues surrounding Section 22-5-110 that warrants, at a minimum, a new trial absolute. In ruling on post-trial motions, Judge Keesley acknowledged his "angst" with regard to the interpretation and application of Section 22-5-110. (R. 7). Ultimately, he denied post-trial motions on the following basis:

Viewing the totality of the circumstances, the court finds that sufficient evidence was presented to enable the jury to determine that the conduct of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the procedure provided in S.C. Code Ann. § 22-5-110, that the Defendant was put on notice by the 11th Circuit Solicitor's office of the applicability of that statute, that there was mention to the Richland County Lieutenant about Magistrates having to issue a courtesy summons in some situations, [and] that the Richland County Deputy failed to alert the Magistrate about the information she obtained related to a courtesy summons.

(R. 7). In sum, Judge Keesley concluded that the issues involving the application of Section 22-5-110 were a significant part of Kay Paschal's case and theory of liability.

Not surprisingly, in her response brief, Paschal now attempts to change the theory of her case and distance herself from any reliance on Section 22-5-110. Although conceding that Section 22-5-110 was raised "on multiple occasions" during the trial, she now contends that Lt. Scott's alleged violation of Section 22-5-110 was not the focus of her case and was only one example of the misconduct. Of course, it is well settled that a party "cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995). The record clearly reflected – as confirmed by Judge Keesley's order on post-trial motions – that the application of Section 22-5-110 was a key issue in this case.¹

It is quite telling that Kay Paschal in her brief never engages in any legal analysis to show that Judge Keesley's rulings with respect to Section 22-5-110 were correct. In his opening brief, Sheriff Lott includes a detailed discussion of Section 22-5-110 and demonstrates clearly that the statute had no application to this case. Specifically, a courtesy summons – rather than an arrest warrant – is to be used only where (1) the affiant is not a law enforcement personnel, and (2) where the individual is charged with a misdemeanor offense. Here, the affiant (Lt. Scott) was a law enforcement officer, and both warrants were issued for felonies.

¹ It is disingenuous for Paschal to now claim that Section 22-5-110 was not a focus of her case. The record reflects that Paschal's counsel, in fact, made the statute itself a trial exhibit. (R. 1012).

If Magistrate Scott Whittle had issued a courtesy summons as the charging document, he would have done so in error. Therefore, Paschal's reliance on Section 22-5-110 to show procedural impropriety on the part of Lt. Scott was entirely in error. Judge Keesley not only erred in failing to correctly interpret Section 22-5-110 and determine that it had no applicability, but he further erred by making the application of Section 22-5-110 a jury question as opposed to what it truly was – a legal issue to be determined by the Court – as Sheriff Lott's counsel requested repeatedly.

Again, in her brief, Kay Paschal does not even attempt to argue that Sheriff Lott's interpretation of Section 22-5-110 is in error. Instead, in a purely conclusory manner, Paschal argues only that the "use of 22-5-110 by the Trial Court was proper and did not constitute an error of law." *See*, Paschal's Respondent's Brief, p. 20. Paschal never explains why.² Instead, she only cites to Judge Keesley's post-trial order. But that order *does not even attempt* to give an interpretation of Section 22-5-110. Importantly, Judge Keesley states that there was "sufficient evidence ... to enable the jury to determine that the conduct of the Defendant in pursuing and obtaining the arrest warrant that is the subject of this action was contrary to the

² It is well settled that "an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). By analogy, the same consequence should result where a respondent attempts to justify the lower court's ruling by making "a short, conclusory statement without supporting authority."

procedure provided in S.C. Code Ann. § 22-5-110." (R. 7). But Judge Keesley still did not provide an interpretation of Section 22-5-110 or explain how or why Lt. Scott's conduct was in violation of Section 22-5-110.

In fact, as Sheriff Lott pointed out in his opening brief, Judge Keesley never made a legal ruling *even during the trial* about what Section 22-5-110 means or how it should have been applied by Magistrate Whittle (or for that matter by Lt. Scott). He continuously deferred such a ruling, and finally concluded in response to the final directed verdict motion that "they're jury issues." (R. 862, 869). Thereafter, he charged the jury with two subsections of Section 22-5-110, but he gave *absolutely no explanation* of their meaning or application, leaving that to the whim of the jury. (R. 937). That constitutes clear reversible error, and Paschal on appeal has not shown otherwise.

With all due respect, Judge Keesley was correct in feeling "angst" as to how he addressed Section 22-5-110 throughout the trial. Yet, he took no corrective action to ensure a fair trial. That "angst" should have convinced him that the issue was not handled correctly and warranted a new trial. Certainly, there has been no showing – by either Judge Keesley during trial or in his post-trial order nor by Paschal in her brief – that Magistrate Whittle misapplied Section 22-5-110 by issuing two arrest warrants for two felony offenses sworn to by a law enforcement officer. If Magistrate Whittle correctly applied Section 22-5-110, as has been shown, then Lt.

Scott did not commit any wrongdoing associated with Section 22-5-110, including any alleged failure to call Magistrate Whittle's attention to the statute.³

The application of Section 22-5-110 was a fundamental legal issue in the case. If there remains any doubt, the Court is urged to review closing arguments by Paschal's counsel. Judge Keesley's handling of that fundamental legal issue – including leaving it to the jury's whim to interpret and apply the statute without assistance – warrants, at a minimum, a new trial absolute.

II. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the malicious prosecution claim where the plaintiff did not show a lack of probable cause for the arrest warrants or the termination of the judicial proceedings in plaintiff's favor.

With respect to the malicious prosecution claim, Sheriff Lott has shown that Kay Paschal failed to present proof of (1) a lack of probable cause, and (2) the termination of the charges in her favor. In her response brief, Paschal does not

³ Paschal argued – and Judge Keesley agreed – that Lt. Scott was "put on notice" of Section 22-5-110 by Deputy Solicitor Dayton Riddle and that she thus had a duty to call that statute's attention to Magistrate Whittle, presumably so that he would issue a courtesy summons rather than an arrest warrant. The Court is urged to review the transcript of the Riddle conversation with Lt. Scott, where he stated: "I don't really have any problem with you -- with you being the affiant on it as long as the magistrate doesn't care. There -- you know, they have that statute out there, and I have not looked at that thing in a long time, but it -- they one that says that you have to give a courtesy summons unless there's a police investigation." (R. 1046). That is the extent of the "notice" that Lt. Scott received about Section 22-5-110 from Deputy Solicitor Riddle. That is hardly notice. But at any rate, as Sheriff Lott has shown, Magistrate Whittle was prohibited from issuing a courtesy summons rather than an arrest warrant for the two felony charges. So, in short, Paschal and Judge Keesley are contending that Lt. Scott erred in failing to advise Magistrate Whittle about a statute that does not even apply. There is no logic to that.

refute Sheriff Lott's position that he was entitled to a directed verdict and JNOV on that claim.

A. Lack of Probable Cause

As for the probable cause issue, Paschal in her response brief addresses generalities only. She fails to specifically address the evidence that was actually known by the arresting officer, namely Lt. Scott. It is well settled that "[p]robable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- *known to the arresting officer.*" *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656, 659 (Ct. App. 2005). (Emphasis added). *See also, Mack v. Lott*, 415 S.C. 22, 780 S.E.2d 761, 761 (2015) ("the proper standard for determining probable cause is an objective standard; that is, whether the facts known to the arresting officer at the time of the arrest, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause").

Instead of focusing on what was known to Lt. Scott, which is the operative standard, Paschal focuses on what was known by Steve Baumgardner, a detective with the Lexington County Sheriff's Office who conducted a brief investigation of his own. While Paschal characterizes Detective Baumgardner's investigation as "thorough," that was clearly not the case and contrary to Baumgardner's own

explanation.⁴ Baumgardner had the investigation for about three weeks before he closed the file upon taking a personal leave of absence from the Sheriff's Office. Baumgardner testified at the time he closed his brief investigation he had not acquired evidence that in his judgment met the probable cause standard. (R. 398-399). However, he fully conceded that his investigation was brief and that additional information could have been acquired to support probable cause. (R. 398-400).

Importantly, the reliance on Baumgardner's investigation is misplaced. What Baumgardner knew or did not know is not the issue – because quite simply he was not the arresting officer. What is the issue is what information was known to Lt. Scott, who *was* the arresting officer. That information is not addressed by Paschal in her response brief. She makes no mention of the conclusions reached by the two forensic document examiners who examined the two versions of the Power of Attorney. She makes no mention of the information known to Lt. Scott about Kay Paschal's involvement in drafting the Power of Attorney or what Lt.

⁴ Detective Baumgardner testified as follows:

Q. -- in that little over three-week period, you did not have sufficient time to perform a complete and thorough investigation to your own standards?

A. I did not, sir. I had other cases. And, quite frankly, this was just one of many that I was investigating.

(R. 399).

Scott knew about the transaction where the Power of Attorney was used by Paschal to purchase the Toyota Sienna van which was then titled in both the names of David Wallace and Kay Paschal.

However, as Sheriff Lott has shown, the information known to Lt. Scott demonstrated that Kay Paschal used the forged Power of Attorney to acquire the Toyota Sienna van and to gain an interest in that van. An objectively reasonable law enforcement officer knowing that information would believe that probable cause existed for one or both charged crimes under South Carolina law. Hence, Sheriff Lott was entitled to a directed verdict and JNOV on the probable cause issue.

B. Favorable Termination of Charges

An additional element that Kay Paschal has the burden of proving is the termination of the judicial proceedings in plaintiff's favor and, more specifically, that the charges were dismissed for reasons which imply or are consistent with innocence. *See, McKenney v. Jack Eckerd Company*, 304 S.C. 21, 402 S.E.2d 887, 888 (1991). In her response brief, Kay Paschal argues that there is "ample evidence" that the charges were dismissed for lack of probable cause. *See, Paschal's Respondent's Brief*, p. 26. The Court is urged to look at Paschal's citations very closely. None of those citations to the record support the conclusion that Magistrate Gary Morgan dismissed the charges *for lack of probable cause*.

Those citations do confirm that the charges were dismissed, but there is no evidence that the charges were dismissed for lack of probable cause. In fact, as discussed by Sheriff Lott in his opening brief, Judge Keesley acknowledged that, given the record at the close of all evidence, he did not know on what basis the magistrate dismissed the charges. (R. 856-857). Quite pointedly, Judge Keesley stated: "There is no clear indication to me as to what ground the judge dismissed it on." (R. 856). Thus, if Judge Keesley did not have knowledge of the magistrate's ruling, neither did the jury. Sheriff Lott submits – and Paschal does not refute – that the record contains no evidence of the magistrate's basis for the dismissal of the charges. That burden of proof fell on Paschal. Her failure to meet that burden requires a directed verdict and JNOV in Sheriff Lott's favor on the malicious prosecution claim.

III. The trial court erred in denying Sheriff Lott's directed verdict and JNOV motions with respect to the abuse of process claim where the evidence does not support either element of that tort.

It is well settled that a plaintiff alleging abuse of process must prove two essential elements: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. American Medical International, Inc.*, 328 S.C. 128, 492 S.E.2d 103, 107 (1997). Sheriff Lott argued in his opening brief that there is no evidence in the record that would support a

finding that Sheriff Lott or his deputies had an ulterior purpose by seeking the issuance of the two arrest warrants. In her response brief, Paschal counters by arguing that Lt. Scott sought the arrest warrants "to assist the Wallace children in pursuing a vendetta (both in and out of Probate Court)." *See*, Paschal's Respondent's Brief, p. 27. Paschal, however, cannot rely on such a claim of an ulterior purpose. Judge Keesley has already rejected that claim. In his post-trial order, Judge Keesley writes as follows:

The court does have serious concerns with the repeated focus by the Plaintiff on aspects that dealt with missing Probate Court hearings and her loss of a claim related to the estate. In the court's view, these claims were largely unproven to the extent that there was not sufficient competent evidence on that subject for the jury to consider them as being proximately caused by any wrongdoing on the part of the Defendant.

(R. 5). That ruling was unappealed by Paschal, and thus constitutes the law of the case. *See, ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives*, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997) (a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). Paschal has presented no alternative theory of an ulterior purpose. Thus, given the absence of an ulterior purpose, Sheriff Lott was entitled to a directed verdict and JNOV on the abuse of process claim.

In addition, in her brief, Paschal points to no evidence that Sheriff Lott or his deputies committed a willful act in the use of the process not proper in the conduct of the proceeding. Paschal offers absolutely no explanation of this element of the cause of action. In Sheriff Lott's opening brief, it was presumed that Paschal was relying on Section 22-5-110 for proof of this element, but for reasons discussed above, Paschal has distanced herself from any theory relying on Section 22-5-110. Yet, she has offered no "new" theory to allow for the verdict on the abuse of process claim to be upheld.

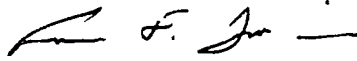
In sum, Sheriff Lott submits that Judge Keesley erred in denying his directed verdict and JNOV motions. The abuse of process claim should have been dismissed for lack of proof.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant-Respondent Leon Lott respectfully requests that this Court reverse the jury's verdict and the order of Judge William P. Keesley filed December 11, 2014, and remand for entry of judgment in Sheriff Lott's favor. In the alternative, Sheriff Lott requests that the Court remand for a new trial absolute. However, should the Court reach the cross-claim brought by the Respondent-Appellant, the Court is asked to affirm the reduction of the verdict to \$300,000.

Respectfully submitted,

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SC Court of Appeals

The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

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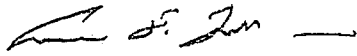
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The undersigned counsel for the Appellant-Respondent Leon Lott certifies that the Reply Brief of Appellant-Respondent complies with the Supreme Court's Revised Order of April 15, 2014, regarding personal identifiers and sensitive information.

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The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant-Respondent, Leon Lott, does hereby certify that service of **Reply Brief of Appellant-Respondent** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 22nd day of July 2016:

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